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of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

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Decisions of the United States Court of International Trade

(Slip Op. 90–129)

ARMCO INC., GEORGETOWN STEEL CORP., AND RARITAN RIVER STEEL CO., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND AMALGAMATED STEEL MILLS, BERHAD, DEFENDANT-INTERVENOR

Consolidated Court No. 88-05-00381

[Dismissed.]

OPINION AND ORDER

(Decided December 11, 1990)

Wiley, Rein & Fielding (*Charles Owen Verrill, Jr.* and *Alan H. Price*), for plaintiffs.
Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*) for the defendant.
Willkie, Farr & Gallagher (*Christopher A. Dunn*), for defendant-intervenor.

MUSGRAVE, *Judge:*

Plaintiffs in this action challenged the determination of the Department of Commerce that several Malaysian steel manufacturers did not receive countervailable benefits from certain tax abatements and allegedly accelerated depreciation rates made available to those companies by the Malaysian Government. In an opinion issued on March 29, 1990, 733 F. Supp. 1514, this Court remanded the matter to the Department of Commerce for further proceedings consisting of a revision of the Department's determination concerning the tax abatements and further investigation of the depreciation allowances.

The Department has subsequently submitted the results of its proceedings on remand in accordance with the order of the Court referred to above. The Court has been informed by counsel for the parties, including the defendant-intervenor, that none of the parties intends to contest the remand results or pursue this action further. Accordingly, the action is hereby dismissed.

(Slip Op. 90–130)

CHRYSLER MOTORS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 89-05-00252

[Defendant's motion for summary judgment granted and complaint dismissed; Plaintiff's cross-motion for summary judgment and declaration that T.D. 89-4 is erroneous and unlawful is denied.]

(Dated December 11, 1990)

Ross & Hardies (*Joseph S. Kaplan*) and *Michelle F. Forte*, of Counsel, for the plaintiff.

Stuart M. Gerson Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Al J. Daniel, Jr.*), and *Edward N. Maurer*, *United States Customs Service*, of Counsel for the defendant.

Beveridae & Diamond, P.C. (*Alexander W. Sierck*), for amici curiae Automotive Parts and Accessories Association, American Iron and Steel Institute, and the Specialty Steel Industry of the United States.

MEMORANDUM OPINION

CARMAN, *Judge*: This action was commenced by plaintiff pursuant to 28 U.S.C. § 1581(a) (1988) contesting the denial of its protest of the liquidation of its drawback entry without the allowance of drawback, which plaintiff sought under section 13 of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1313(j) (1988).[1]

Defendant now moves pursuant to Rule 56 of the Rules of this Court for summary judgment and to dismiss the complaint. Defendant also moves this Court to strike the affidavit of George C. Steuart, an attorney and former employee of the United States Customs Service, as an attachment to plaintiff's cross-motion for summary judgment on the grounds that the affidavit does not contain competent evidence concerning any pertinent factual matter and that Mr. Steuart's legal opinions concerning the regulations are inadmissable as evidence.

Plaintiff, opposing defendant's motion for summary judgment, cross-moves for summary judgment, requests the Court to declare that the transfer of merchandise to a foreign-trade zone for the purpose of manufacture constitutes *exportation* (entitling plaintiff to drawback), and contends that T.D. 89-4 is erroneous and unlawful.[2] Plaintiff further re-

[1] As defendant points out in its *Memorandum of Law in Support of Defendant's Motion for Summary Judgment* (Defendant's Memorandum) at 2, an earlier action challenging T.D. 89-4 (which was to become effective on February 27, 1989), was filed by plaintiff and Armatron International, Inc. on February 22, 1989, pursuant to 28 U.S.C. § 1581(h) and (i) (1988), *Chrysler Motors Corp. v. United States*, CIT Court No. 89-02-00086 (Jan. 24, 1990). This Court issued on February 23, 1989, a temporary restraining order preventing application of T.D. 89-4 as to plaintiff. Pursuant to a stipulation and order, an agreement was reached that resulted in the dissolution of the temporary restraining order. Chrysler was to file a single drawback entry with a timetable for action by the Customs Service. A new action was to be filed pursuant to 28 U.S.C. § 1581(a) (1988) if Customs denied plaintiff's claim for drawback. This action was commenced pursuant to that stipulation.

[2] T.D. 89–4, 53 Fed. Reg. 52,411, 52,414 (Dec. 28, 1988) is a final interpretative rule by the Customs Service which concluded that since the Foreign-Trade Zone Act provided no authority permitting merchandise to be considered exported when it was sent to a foreign-trade zone in the United States for manufacturing, no claims for drawback should be allowed. This final interpretation, which Chrysler challenges, revoked two Customs rulings, C.S.D. 8497, 18 Cust. Bull. 1069 (1984), *republished as* C.S.D. 85-10, 19 Cust. Bull. 509 (1985) and Headquarters Ruling Letter 218551 (Jan. 29, 1986), both of which expressly permitted merchandise to be considered as exported when it was sent to a foreign-trade zone for the purpose of manufacturing. The change of position by Customs and the loss of drawback by Chrysler is the major area of dispute in the instant case.

quests this Court to direct that the entry which is the subject of this action be reliquidated with drawback allowed.

Amici support defendant's motion for summary judgment.

FACTS

The following facts are not in dispute. Plaintiff, a manufacturer of motor vehicles in the United States, assembles certain motor vehicles in designated foreign-trade sub-zones within the United States from subassemblies of domestic- and foreign-sourced components. Joint Stipulation of Facts (Joint Stip.) at 1. On March 28, 1989, plaintiff filed with defendant Customs Form 7539, Entry No. C38003381-8 seeking drawback pursuant to 19 U.S.C. § 1313(j) (1988) on previously imported duty-paid merchandise which was transferred to a foreign-trade zone for manufacturing. Joint Stip. at 1-2. The drawback entry application of plaintiff stated that the merchandise on which the drawback was sought consisted of 108 pieces described as "shaft assy fwd" (the merchandise), which was imported into the United States on December 23, 1988, by GKN Automotive, Inc. and on which $143.27 was paid in duties. On March 3, 1989, GRN Automotive, Inc. issued a certificate of delivery of imported merchandise to plaintiff covering the merchandise. Plaintiff submitted to Customs an application for admission of the merchandise to plaintiff's foreign-trade sub-zone at St. Louis, where plaintiff elected to treat the merchandise as "non-privileged foreign". Joint Stip. at 2.

The documents submitted by plaintiff to Customs in connection with plaintiff's drawback entry certified that the merchandise was transferred to the foreign-trade zone for the purpose of manufacturing in the same quantity and quality value and packaging as specified in the entry. Joint Stip. at 2.

On April 14, 1989, Customs liquidated the entry and denied drawback, stating as its reasons: "Ruling 218551 revoked by T.D. 89-4, effective February 27, 1989." Joint Stip. at 3.

Plaintiff duly protested the liquidation by Customs without benefit of drawback. Customs denied the protest. Plaintiff then commenced the instant action.

BACKGROUND

Drawback is the reimbursement of duties paid on goods imported into the United States and then used in the manufacture or production of articles which are subsequently exported. *Nicholas & Co. v. United Sates*, 7 Ct. Cust. App. 97 (1916), *aff'd*, 249 U.S. 34 (1919). Customs has defined drawback in its regulations as follows:

> 'Drawback' means a refund or remission, in whole or in part, of a customs duty, internal revenue tax, or fee lawfully assessed or collected because of a particular use made of the merchandise on which the duty, tax, or fee was assessed or collected.

19 C.F.R. § 191.2(a) (1989).

Drawback is usually permitted upon the exportation of articles manufactured or produced in the United States in whole or in part with the

use of imported merchandise, 1 R. Sturm, *Customs Law and Administration* § 17.1 (3rd ed. 1989). Duties which are subject to drawback include dumping, countervailing, marking, and ordinary customs duties. 19 C.F.R. S 191.3 (1989). Detailed and specific provision for different types of drawback is made by statute and regulation. 19 U.S.C. § 1313(a)-(1) (1988); 19 C.F.R. § 191.4 (1989).[3]

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[3] Customs has identified through regulation 19 C.F.R. § 191.4 when drawback duties and taxes are ordinarily authorized:

(1) *Direct identification drawback.* Drawback of duties is provided for in section 313(a), Tariff Act of 1930, as amended (19 US.C. 1313(a)), upon the exportation of articles manufactured or produced in the United States wholly or in part with the use of imported merchandise.

(2) *Substitution drawback.* If imported duty-paid merchandise and duty-free or domestic merchandise of the same kind and quality are used in the manufacture or production of articles within a period not to exceed 3 years from the receipt of the imported merchandise by the manufacturer or producer of the articles, drawback is provided for in section 313(b), Tariff Act of 1930, as amended (19 U.S.C. 1313(b)), upon the exportation of any of the articles, even though none of the imported merchandise may actually have been used in the manufacture or production of the exported articles. The amount of drawback is the same as that which would have been allowed had the merchandise used therein been imported.

(3) *Merchandise not conforming to sample or specifications or shipped without consent of consignee.* Drawback is provided for in section 313(C), Tariff Act of 1930, as amended (19 U.S.C. 1313(c)), upon the exportation of imported merchandise not- conforming to sample or specifications or shipped without consent of the consignee.

(4) *Drawback of internal-revenue taxes.* Drawback of internal-revenue taxes is provided for in section 313(d), Tariff Act of 1930, as amended (19 U.S.C. 1313(d)), upon the exportation of flavoring extracts and medicinal or toilet preparations (including perfumery) manufactured or produced in the United States in part from domestic tax-paid alcohol.

(5) *Imported salt for curing fish.* Drawback of duties is provided for in section 313(e), Tariff Act of 1930, as amended (19 U.S.C. 1313(e)), on salt imported in bond and used in curing fish. (See section 10.80 of this chapter.)

(6) *Exportation of meats cured with imported salt.* Drawback of duties is provided for in section 313(f), Tariff Act of 1930, as amended (19 U.S.C. 1313(f)), in amounts of not less than $100, upon the exportation of packed or smoked meats cured in the United States with imported salt.

(7) *Material for construction and equipment of vessels and aircraft built for foreigners.* Drawback of duties is provided for in section 313(g), Tariff Act of 1930, as amended (19 U.S.C. 1313(g)), on materials imported and used in constructing and equipping vessels and aircraft built for foreign account and ownership or for the government of any foreign country, even though these vessels and aircraft may not be exported within the strict meaning of the term.

(8) *Foreign-built jet aircraft engines processed in the United States.* Drawback of duties is provided for in section 313(h), Tariff Act of 1930, as amended (19 U.S.C. 1313(h)), in amounts of not less than $100, upon the exportation of jet aircraft engines manufactured or produced abroad that have been overhauled, repaired, rebuilt or reconditioned in the United States with the use of imported merchandise, including parts.

(9) *Direct Identification same condition drawback.* Drawback of duties is provided for in section 313(j)(1), Tariff Act of 1930, as amended (19 U.S.C. 1313(j)(1), on imported merchandise exported in the same condition as when imported, or destroyed under Customs supervision and not used within the United States before such exportation or destruction.

(10) *Substitution same condition drawback.* Drawback of duties is provided for in section 313(j)(3), Tariff Act of 1930, as amended (19 U.S.C. 1313(j)(3), on merchandise fungible with imported merchandise when exported or destroyed under Customs supervision, provided all the conditions described under § 191.141(h) are complied with.

(11) *Packaging materials.* Drawback of duties is provided for in section 313(j)(4), Tariff Act of 1930, as amended (19 U.S.C. 1313(j)(4)), on packaging material used to package or repackage merchandise exported with direct identification same condition drawback. (19 U.S.C. 1313(j) contains two paragraphs numbered (4). See first paragraph (4).)

(12) *Supplies for certain vessels and aircraft.* Drawback of duties and taxes is provided for in section 309(b), Tariff Act of 1930, as amended (19 U.S.C. 1309(b)), on articles withdrawn from bonded warehouses, bonded manufacturing warehouses, continuous Customs custody elsewhere than a bonded warehouse, or foreign trade zones and articles of domestic manufacture or production, which are laden as supplies upon certain vessels or aircraft of the United States or as supplies including equipment upon or used in the maintenance or repair of certain foreign vessels or aircraft.

(13) *Merchandise exported from continuous Customs custody.* Drawback of duties is provided for in accordance with section 557(a), Tariff Act of 1930, as amended (19 U.S.C. 1557(a)), upon the exportation to a foreign country or the shipment to the Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam, of merchandise upon which duties have been paid which has remained continuously in bonded warehouse or otherwise in Customs custody since importation, provided it was exported or shipped within 5 years after the date of its importation.

(14) *Merchandise transferred to a foreign trade zone from Customs territory.* Drawback of duties and taxes is provided for in accordance with the fourth proviso of section 3 of the Foreign Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81c), on merchandise transferred to a foreign trade zone from Customs territory for the sole purpose of exportation, destruction (except destruction of distilled spirits, wines, and fermented malt liquors), or storage.

(b) *Refund of internal revenue taxes on imported distilled spirits, wines, or beer.* Refund, remission, abatement, or credit of internal revenue taxes paid or determined incident to importation on imported distilled spirits, wines, and beer is provided for in accordance with section 5062(c) Internal Revenue Code, as amended (26 U.S.C. 5062(c)), upon the exportation, or destruction under Customs supervision of these articles found after entry to be unmerchantable or not to conform to sample or specifications and which are returned to Customs custody.

19 C.F.R. § 191.4 (1989).

Congress, which provided for the allowance of drawback claims under 19 U.S.C. § 1313(a)-(1) (1988), delegated authority to issue regulations to the Commissioner of Customs to describe in detail the type of drawback allowed, eligibility requirements, and procedures for filing claims. 19 C.F.R. § 191.1 (1989). Procedures for completion, payment, and liquidation of drawback claims are made by Customs regulations. 19 C.F.R. § 191.61 to .73 (1989). The refusal to pay a claim for drawback is treated as final and conclusive upon all persons, including the United States, unless a protest is filed or unless a civil action contesting the denial of such a protest in whole or in part is commenced in the United States Court of International Trade. *See* 19 U.S.C. § 1514(c) (1988), 28 U.S.C. 1581(a) (1988).

The rationale for allowing drawback is to encourage the production of articles for export in the United States, increasing foreign commerce, and assisting American labor and industry. *Tide Water Oil Co. v. United States*, 171 U.S. 210, 216 (1898); *United States v. Int'l Paint Co., Inc.*, 35 CCPA 87, 90, C.A.D. 376 (1948); *United States v. Nat'l Sugar Ref. Co.*, 39 CCPA 96, 99, C.A.D. 470 (1951).

Drawback of Customs duties was recognized from the earliest times of our Republic. *See* Act of July 4, 1789, ch. II, §§ 3-4, 1 Stat. 24, 26-27 (1789). Congress has passed laws pertaining to drawback over the years, *see* Table No. III, 1 Stat. xcii-xciii (1789-1799); Rev. Stat. §§ 3015, 3016-24, 3044, 3049 (1878), and has continued to concern itself with drawback. *See supra* note 3.

The original Tariff Act of 1930, 46 Stat. 693 (1930), made provision for drawback upon exportation of imported merchandise that had been manufactured in some way in the United States. In 1980, Congress amended the Tariff Act of 1930 and authorized drawback upon imported merchandise that was subsequently exported without being manufactured (same condition drawback). Tariff Act of 1930, Pub. L. No. 96-609, 94 Stat. 3560 (1980) (codified as amended at 19 U.S.C. § 1313(j) (1988)).

Statutory provisions for the treatment of foreign merchandise in foreign-trade zones is set forth in pertinent part at 19 U.S.C. § 81c(a) (1988) as follows:

> Foreign and domestic merchandise of every description, except such as is prohibited by law, may, without being subject to the customs laws of the United States, except as otherwise provided in this chapter, be brought into a zone and may be stored, sold, exhibited, broken up, repacked, assembled, distributed, sorted, graded, cleaned, mixed with foreign or domestic merchandise, or otherwise manipulated, or be manufactured except as otherwise provided in this chapter, and be exported, destroyed, or sent into customs territory of the United States therefrom, in the original package or otherwise; but when foreign merchandise is so sent from a zone into customs territory of the United States it shall be subject to the laws

and regulations of the United States affecting imported merchandise:

* * * * * * *

Provided further, [the Third Proviso] That if in the opinion of the Secretary of the Treasury their identity has been lost, such articles not entitled to free entry by reason of noncompliance with the requirements made hereunder by the Secretary of the Treasury shall be treated when they reenter customs territory of the United States as foreign merchandise under the provisions of the tariff and internal-revenue laws in force at that time: *provided further*, [the Fourth Proviso] That under the rules and regulations of the controlling Federal agencies, articles which have been taken into a zone from customs territory for the sole purpose of exportation, destruction (except destruction of distilled spirits, wines, and fermented malt liquors), or storage shall be considered to be exported for the purpose of—

(1) the draw-back, warehousing, and bonding, or any other provisions of the Tariff Act of 1930, as amended, and the regulations thereunder; and

(2) the statutes and bonds exacted for the payment of drawback, refund, or exemption from liability for internal-revenue taxes and for the purposes of the internal-revenue laws generally and the regulations thereunder.

Such a transfer may also be considered an exportation for the purposes of other Federal laws insofar as Federal agencies charged with the enforcement of those laws deem it advisable. Such articles may not be returned to customs territory for domestic consumption except where the Foreign-Trade Zones Board deems such return to be in the public interest * * *.

Section 313 of the Tariff Act of 1930, Pub. L. No. 96-609, 94 Stat. 3560 (1980) (codified as amended at 19 U.S.C. 1313(j) (1988)) provides in part:

(1) If imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law because of its importation—

(A) is, before the close of the three-year period beginning on the date of importation—

(i) exported in the same condition as when imported, or

(ii) destroyed under Customs supervision; and

(B) is not used within the United States before such exportation or destruction;

then upon such exportation or destruction 99 per centum of the amount of each such duty, tax, and fee so paid shall be refunded as drawback.

Contentions of the Parties

Plaintiff contends that the New Rule T.D. 89-4, effective Feb. 27, 1989, 19 C.F.R. § 146 (1989), that was adopted by Customs, is contrary

to the statute and unlawful on its face. Furthermore, plaintiff urges that defendant lacked legal justification to revoke a pre-existing practice since the practice resulted from a reasonable and long-standing interpretation of the relevant statute. *Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Cross-Motion for Summary Judgment* (Plaintiff's Memorandum) at 1.

Plaintiff points out that to reduce its costs relative to competing with foreign-built vehicles, it established an extensive purchasing and delivery system in connection with its foreign-trade zone facilities. It purchased imported components from vendors who were obligated to warehouse and test the components in the United States. The components were designated for delivery to plaintiff's manufacturing facilities in foreign-trade zones on an "as needed" basis, so that they were transferred to the zone facilities at a time for immediate utilization in manufacturing. In reliance on several Customs rulings which interpreted and applied the Foreign Trade Zone Act, plaintiff invested funds and expanded its systems to better utilize the zones. *Plaintiff's Response to Defendant's Statement and Plaintiff's Additional Statements of Material Facts as to Which There Is No Genuine Issue to Be Tried* (Plaintiff's Response) at 2, 3. Plaintiff also points out that the New Rule will require Chrysler to abandon the system it developed, which was sanctioned by Customs, and will force the dismissal or retraining of employees hired and trained to operate the system.

Plaintiff indicates that as an original equipment vehicle manufacturer in the automotive industry, it buys vendor-supplied components on a model-year basis. Plaintiff argues that these contractual obligations were made at prices contemplating the old practice sanctioned by Customs which allowed claims for drawback for imported merchandise brought into a foreign-trade zone for manufacturing. Plaintiff Chrysler asserts that if the New Rule is to prevail, it will incur unanticipated additional costs on components contracted for prior to the New Rule. It will incur thereafter excessively high costs because it will be unable to recover the duties paid by its vendors. Plaintiff's Response at 5.

Defendant contends Congress authorized the payment of drawback upon duty-paid merchandise admitted to a foreign-trade zone only when brought into a foreign-trade zone *solely* for the purpose of exportation or destruction, citing 19 U.S.C. §§ 81c(a) and 1313(j). Defendant's Memorandum at 20. Since the imported merchandise was imported for manufacture rather than exportation or destruction, no drawback claims were authorized by Congress. Defendant's Memorandum at 21. Defendant urges that Customs interpretation of Rule T.D. 89-4 is reasonable, is supported by statutory legislative history and applicable regulations, and should be sustained. Defendant's Memorandum at 21.

Discussion

This Court is presented with the question of whether Customs correctly denied plaintiff's claim for drawback for duty paid on foreign mer-

chandise which was transferred to a foreign-trade zone for the express purpose of manufacturing, where plaintiff planned to return the merchandise to the Customs territory of the United States. If the transferred foreign merchandise is considered "exported" for the purpose of drawback claims, plaintiff is entitled to be paid on its claim. If the merchandise is not considered "exported" for the purpose of drawback claims, plaintiff is not entitled to a refund.

Customs initially determined that imported merchandise entered under a temporary import bond for processing in the United States and transferred to a foreign-trade zone for manufacturing would be considered "exported" for customs purposes. In its previous ruling, which was overturned by T.D. 89-4, imported steel cut to specifications and transferred to a foreign-trade zone to be used to manufacture motor vehicles for domestic consumption was considered "exported" for Customs purposes. The ruling provides in part as follows:

> All merchandise may be brought into a zone unless it is specifically prohibited from coming into the zone by some provision of the FTZ Act. When such merchandise will be used in manufacturing in a FTZ, it is considered exported (except when otherwise indicated in the FTZA) for Customs purposes when brought into the zone. If thereafter the merchandise is manufactured in the zone into new and different articles, * * * the manufactured articles may, upon the payment of proper duty, be admitted to the Customs territory.

C.S.D. 84-97, 18 Cust. Bull. 1069 (1984), *republished as* C.S.D. 85 10, 19 Cust. Bull. 509 (1985).

Customs, through Headquarters Ruling Letter 218551 (Jan. 29, 1986) which was similarly overturned by T.D. 89–4, expressly allowed (citing as authority C.S.D. 84–97 and C.S.D. 85–10) the payment of duty drawback claims or the cancellation of temporary importation bonds for imported merchandise transferred to a foreign-trade zone for manufacturing of motor vehicles for domestic consumption.

T.D. 89–4, which overturned C.S.D. 84–94 (also published as C.A.D. 85-10 and Headquarters Ruling Letter 218551), determined that since the Foreign-Trade Zone Act provided no authority permitting merchandise to be considered exported when it was sent to a foreign-trade zone in the United States for manufacturing, no claim for drawback should be allowed. *See supra* note 2.

When Congress first made provision for foreign-trade zones, it was perceived that these zones would relieve businesses from the burden of paying duties on imported merchandise and then having to seek drawback upon exportation, or employing bonds or bonded warehouses for export duties. H.R. Rep. No. 1521, 73rd Cong., 2d Sess. 2-3 (1934). The Senate Report, explaining the purpose of foreign-trade zones and quoting from an earlier report of the Tariff Commission stated:

> The purpose of a foreign-trade zone, as stated in that report, is—
>
> to encourage and expedite that part of a nation's foreign trade which its government wishes to free from the restrictions necessi-

> tated by customs duties. In other words, it aims to foster the dealing in foreign goods that are imported, not for domestic consumption, but for re-export to foreign markets and for conditioning, or for combining with domestic products previous to export.

S. Rep. No. 905, 73rd Cong., 2d Sess. 1, 2 (1934).

While section 3 of the original Foreign-Trade Zones Act provided that foreign and domestic merchandise could be brought into the foreign-trade zone without being subject to the Customs laws of the United States, it expressly barred the manufacture of foreign or domestic merchandise in a foreign-trade zone. Foreign-Trade Zones Act, ch. 590, § 3, 48 Stat. 999 (1934) (current version at 19 U.S.C. § 81c (1988)).

In 1950, section 3 of the Foreign-Trade Zones Act was amended to permit manufacturing in foreign-trade zones and added a fourth proviso which authorized drawback on certain merchandise taken into the zone. Pub. L. No. 566, 64 Stat. 246-47 (1950) (codified as amended at 19 U.S.C. § 81c (1988)).

The Senate Report explaining the implementation of the fourth proviso concerning the then new drawback provision said:

> This section would add to section 3 of the act a new fourth proviso that under the rules and regulations of the controlling Federal agencies articles taken into a zone from customs territory for the sole purpose of exportation, destruction * * *, or storage would be considered to be exported for the purpose of certain Federal laws. * * * Therefore a transfer of an article from customs territory to a zone for any of the authorized purposes would be considered the equivalent of exportation so far as any provision of the tariff act is concerned. Articles manufactured in customs territory with the use of imported duty-paid materials could be transferred to a zone and draw-back of duties would thereupon become payable without actual exportation. Imported merchandise in customs bonded warehouse or otherwise under customs bond could be transferred to a zone and liability under the bonds extinguished to the same extent, and subject to all other requirements and regulations, as if actually exported.

S. Rep. No. 1107, 81st Cong., 1st Sess. 4-5 (1949), *reprinted in* 1950 U.S. Code Cong. & Admin. News 2533, 2536-37.

The Senate Report stated further:

> The benefits of the fourth proviso would be limited specifically to articles taken into a zone for *exportation*, destruction, or storage, *and would not apply to articles taken into a zone* for consumption, or *with the intent of eventual reentry into customs territory*. The benefits would not extend to articles taken into a zone for manipulation or manufacture prior to exportation. The proviso would furnish relief for manufacturers and other business interests whose merchandise is destined eventually for export use but which merchandise, for one reason or another, cannot practicably be exported immediately. In such cases the proviso would authorize refund by way of draw-back of duties and taxes while the merchandise remained in a zone awaiting actual exportation, and would also re-

> lieve the interested parties from expense and liability of customs and internal-revenue bonds. Imported merchandise which had been stored in a customs bonded warehouse for almost the full statutory time limit of three years could, under the provision, be transferred to a zone for further storage pending actual exportation. Another use of the proviso might be in the encouragement of the establishment in foreign-trade zones of world markets for various commodities.
>
> Articles receiving the benefits of the proviso could be shipped in bond through customs territory in process of exportation, but could not be returned from the zone to customs territory for domestic consumption except where the Foreign-Trade Zones Board deemed such return to be in the public interest in which event the articles would be subject to a duty equal to the duty and tax from which they had previously been relieved in accordance with the provisions of paragraph 1615 (f) of the Tariff Act of 1930 as amended.

Id. at 5 (emphasis added).

The House Report sets forth a similar explanation of the function of the fourth proviso and contains an explanation as to the limitation on merchandise that can qualify for drawback claims under the fourth proviso which are identical to those in the Senate Report. H.R. Rep. No. 957, 81st Cong., 1st Sess. 4-5 (1949), *reprinted in* 1950 U.S. Code Cong. & Admin. News 2533, 2536-37.

It has long been established that as a rule of statutory construction, courts should treat the plain language of statute as controlling absent clear legislative intent to the contrary. *United States v. Turkette*, 452 U.S. 576, 580 (1981). *Consumer Protection Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The terminology set forth in 19 U.S.C. 81c(a) is quite clear. Claims for drawback should be allowed only on the specific grounds authorized. *See supra* note 3.

This Court finds that the plain language of the relevant statutes is unambiguous and concludes that the legislative history further emphasizes Congress never intended to authorize drawback claims for merchandise brought into foreign-trade zones for the purpose of manufacturing with ultimate use for domestic consumption as sought by plaintiff. *See* S. Rep. No. 1107, 81st Cong., 1st Sess. 4-5 (1949); H.R. Rep. No. 957, 81st Cong., 1st Sess. 4-5 (1949). The Supreme Court held in *Campbell v. United States*, 107 U.S. 407, 413 (1882) that "[t]he purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country,— articles which are not sold or consumed in the United States."

This Court holds imported merchandise, which is transferred to a foreign-trade zone for the purpose of manufacturing for ultimate domestic consumption, is subject to liquidation *without* drawback.

The Supreme Court held in *Swan & Finch Co. v. United States*, 190 U.S. 143, 146 (1903) that the right to drawback is a privilege granted by the government and any doubt as to the construction of the statute must

be resolved in favor of the government. *Id.* "Over the years, the courts have held that the allowance of drawback is a privilege and compliance with the regulations is a prerequisite to securing it where the regulations are authorized and reasonable. *Lockheed Petroleum Services, Ltd. v. United States*, 4 CIT 25, 28-29, 557 F. Supp. 583, 586 (1982) (citing *United States v. Ricard-Brewster Oil Co.*, 29 CCPA 192, C.A.D. 191 (1942); *Garret-Hewitt Int'l v. United States*, 65 Cust. Ct. 656, C.D. 4154 (1970).

Even if this Court were to interpret a statute differently, in a first instance situation, if an interpretation of a statute by an agency charged with its execution is reasonable, it should be followed unless there are compelling indications the interpretation is wrong. *Chevron U.S.A. Inc. v. National Resources Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). Customs made reasonable interpretation of the purposes of the Foreign-Trade Zone Act. It gave public notice of its intentions to revoke the prior rulings which permitted drawback claims under circumstances similar to the instant case and accepted almost one hundred comments in response to its notice. T.D. 89-4, 53 Fed. Reg. 52,411, 52,412 (Dec. 28, 1988).

Furthermore, as Senior Judge Maletz of this Court has pointed out:

> Agency practice, once established, is not frozen in perpetuity. Agencies frequently adopt one interpretation of a statute and then, years later, adopt a different view. As long as the new interpretation is consistent with Congressional intent, an agency may make a 'course correction.'

Toyota Motor Sales, U.S.A., Inc. v. United States, 7 CIT 178, 193, 585 F. Supp. 649, 661 (1984), *aff'd*, 753 F.2d 1061 (Fed. Cir. 1985). This Court holds that T.D. 89-4 is reasonable, lawful, and must be sustained.

According to plaintiff, Customs was without authority to revoke its previous practice unless clearly wrong. Memorandum of Plaintiff at 41. Plaintiff urges that the Foreign-Trade Zone Act expressly authorizes drawback for merchandise sent to a foreign trade zone for manufacture. Plaintiff contends Congress acquiesced in the previous determination by Customs which allowed drawback. Plaintiff's Memorandum at 25, 26. This Court finds these contentions are without merit.

As set forth in the determination by Customs, where an agency interpretation of legislation is clearly erroneous, Congress must give express consideration or make specific reference to it in later legislation in order to ratify that interpretation citing *Kristensen v. McGrath*, 179 F.2d 796, 803-04 (D.C. Cir. 1949), *aff'd*, 340 U.S. 162 (1950); *United States v. Mo. Pac. R.R. Co.*, 278 U.S. 269, 280 (1929). There has been no such ratification by Congress.

Notwithstanding the holding in this case, this court is not unmindful of the frustrations of plaintiff. Plaintiff has apparently made long-term business decisions involving substantial sums of money based in large measure upon its understanding that Customs would allow drawback claims for foreign merchandise on which duty was paid when the mer-

chandise was admitted into a foreign-trade zone for the express purpose of manufacture.

If plaintiff acquired foreign automotive parts outside the Customs territory of the United States and manufactured its product outside the Customs territory of the United States to save costs, there would be no drawback claim question. There would be no domestic manufacturing jobs either. Concomitant concerns of domestic parts manufacturers and suppliers represented by amici must also be considered.

In any event, the Courts and administrative agencies are powerless to remedy these frustrations. Relief, if it is to come at all, must come from Congress.

Conclusion

Defendant's motion for summary judgment is granted and the complaint is dismissed. Plaintiff's cross-motion for summary judgment and the request to declare the transfer of merchandise to a foreign-trade zone for the purpose of manufacture constitutes exportation and that T.D. 89–4 is erroneous and unlawful is denied. Plaintiff requests that the entry which is the subject of this action be reliquidated with drawback allowed is denied. This Court makes no determination as to defendant's motion to strike the affidavit of an attorney and former employee of the U.S. Customs Service as an attachment to plaintiff's cross-motion papers, deeming such determination unnecessary in light of the holding herein.

(Slip Op. 90-131)

United Electrical, Radio and Machine Workers of America, United Electrical, Radio and Machine Workers of America, Local 610, Michael Murphy, James Cappetta and Edward Kristofik, plaintiffs *v.* Elizabeth Dole, Secretary of Labor, U.S. Department of Labor, defendant

Court No. 86-11-01409

[Remanded.]

(Decided December 13, 1990)

United Elec., Radio and Mach. Workers of America, (*Robin Alexander*), *Neighborhood Legal Services Ass'n*, (*John Stember*) for the plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Velta A. Melnbrencis*), *Gary Bernstecker*, U.S. Department of Labor, of counsel, for the defendant.

MEMORANDUM AND ORDER

RESTANI, *Judge*: Defendant has now submitted its third determination to the court.[1] Plaintiffs, former employees of the Swissvale, Pennsylvania plant of Union Switch and Signal ("Company" or "Union Switch"), a company producing railway systems, claim that they lost their jobs because the Company substituted foreign imports for products formerly produced at Swissvale.[2] Initially, the Department of Labor ("Labor" or "Secretary") denied certification of any Swissvale workers. Labor, on redetermination after finding that it had conducted an inadequate investigation, certified three sections of the plant, comprising section 110 (sheet metal fabrication), section 390 (dipping of sheet metal to prevent rusting), and section 222 (part of Unit Shop II that wired office control panels). The certification included sixty (60) of approximately five hundred (500) workers.

Petitioners objected to the determination, claiming that the Company had previously supplied false and misleading information to Labor, and that imported Canadian panels adversely affected employment throughout the plant. Moreover, plaintiffs claimed that other imports, such as Korean relay frames and Italian train-stop kits, caused layoffs. The court sustained the findings with respect to Korean relay frames but remanded the case once more for further investigation of the other two items. *See United Electrical II*. The results of that remand, which the court will refer to as the "third remand investigation," are the subject of this opinion.

I. FACTS

On March 28, 1990, during the third investigation, Labor obtained a sworn affidavit executed by V. John Poremba. Supplemental Administrative Record (Supp. Ad. R.) at 8-12. The affiant stated that he had been Vice President of Manufacturing at Union Switch for more than ten years until his retirement approximately four years ago, some months prior to the end of the investigatory period. As Vice President, he had been responsible for all Company plants, including plants in Pennsylvania, South Carolina, Georgia, and Ireland. Supp. Ad. R. at 8. The Swissvale plant produced train control systems and equipment. The systems consisted of control panels and relays which were arranged according to engineering specifications. According to Mr. Poremba the engineering content contributed between 15 percent and 30 percent of the total work. The higher percentage engineering content involved totally new systems designs. Supp. Ad. R. 8-9.

Mr. Poremba stated that he had examined the process sheet and the bill of materials included in the administrative record at pp. A-29, A-43 and A-44[3], and believed them to represent the type and size of panels

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[1] For a more detailed history of this case, *see United Elec., Radio & Mach. Workers of Am. v. United States*, 11 CIT 590, 669 F. Supp. 467 (1987) (*United Electrical I*) and *United Elec., Radio & Mach. Workers of Am. v. Brock*, 14 CIT ____, 731 F. Supp. 1082 (1990) (*United Electrical II*).

[2] Following a bitter strike, separations began in 1983 and continued until the plant shut down in 1987.

[3] The prefix "A-" refers the administrative record compiled during the first remand investigation.

produced at Swissvale. The larger panels, of which Swissvale produced between four to six per year, were associated with control systems with a total value that far exceeded the typical panel referred to in the earlier administrative records. The discrepancy in value was due to the heavy engineering content and the value of the wiring and equipment in the control panel. According to the affidavit, even in the case of the one control panel imported from Canada that he recalled, all of the wiring and equipment was added at Swissvale. Moreover, the bulk of the components listed on pp. A-43 and A-44, which completion of the panel required, would have been supplied from Swissvale even if the Company had purchased the panel from outside sources. Supp. Ad. R. at 9-10.

With regard to the purchase order for the Italian train-stop kit at C-1334[4], Mr. Poremba stated that to the best of his recollection, this purchase involved engineering and technology different from that employed at Swissvale. Supp. Ad. R. at 10-11.

In a sworn statement dated April 2, 1990, Andrew J. Carey, Director of Transit Engineering and Michael L. Grossman, Director of Transit Projects, confirmed the following information regarding the Company's supply of an Automatic Train Stop System as part of Contract Number CY-111 with the Port Authority of Allegheny County (PAC):

1. The Technical Specification for Contract CY-111 required an "intermittent" train-stop system.

2. Union Switch did not manufacture such a train-stop system.

3. In order to comply with the Technical Specification, Union Switch subcontracted with Compagnia Italiana Segnali (CIS) of Torino, Italy for the supply of the train-stop system. Supp. Ad. R. at 14.

By letter dated April 3, 1990, Mr. Grossman supplied the following additional information regarding the train-stop system provided by Union Switch to PAC under Contract CY-111 (Supp. Ad. R. at 15):

1. The Technical Specification for Contract CY-111 called for an "intermittent" train-stop system, which was the type of system in common use in European countries; Union Switch & Signal's own type of train-stop system was "continuous," which is typically employed by railways and transit authorities in the United States.

2. The CY-111 contract was for a total of approximately $20,000,000, of which the train-stop system represented $1,200,000. Of this $1,200,000, approximately $250,000 was for engineering.

Unable to locate a significant amount of documentary evidence supporting these statements, Labor held a hearing under a protective order on May 23, 1990. Company officials Messrs. Michael Grossman, Andrew J. Carey, V. John Poremba, and Louis D. Kopsa testified pursuant to the Secretary's subpoenas. Petitioners asked to present their own witnesses but Labor denied this request. Labor did not allow petitioners to cross-examine the witnesses.[5]

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[4] The prefix "C-" refers to the administrative record compiled during the second remand investigation.

[5] In *United Electrical II*, the court did not direct Labor to allow petitioners to cross-examine Company witnesses, but said that Labor could allow such cross-examination if it so chose. The court did direct Labor to allow petitioners to submit questions to the hearing examiners for them to propound to the witnesses should they find these questions helpful.

Subsequent to the hearing, plaintiffs submitted to Labor undated, unsworn statements, captioned affidavits, from Messrs. Bruce Wilson, James Fonzi, John Fabrizi and V. John Poremba. Supp. Ad. R. at 55-60. Mr. Wilson stated that he had been employed at Union Switch for over 35 years and that, between 1980-85, he was the management employee in charge of the Quality Assurance Section (QA), which had responsibility for testing/simulation of systems, including display panels. A test/simulation could take a number of months, involving upwards of 45 employees in two shifts. According to Mr. Wilson, the importation of Canadian panels had a significant effect on employment throughout the plant because the imported panels came with the component parts, which Swissvale had manufactured, already installed and with the wiring complete. The only work remaining to be completed was the wiring together of the already finished panel sections. By importing panels, the Company reduced the workload of the QA section by one third. Mr. Wilson estimated that imports of panels and other components eliminated well over twenty percent of the jobs at Swissvale because departments throughout the plant (engineering, drafting, store room, machine shop, engraving, silk screening, fabricating, shipping, receiving, assembly, and testing) were affected by the importation of panels. According to Mr. Wilson, Swissvale had made vital and non-vital relays that were used extensively as component parts in rail control systems, including display panels. By the time Mr. Wilson left Swissvale, the LP-100 non-vital relay, which Swissvale had produced in large quantities, had been replaced by the mid-tex relay, produced in Mexico. Supp. Ad. R. at 56.

Mr. Fonzi stated that he had been employed by Union Switch for 43 years; that he last worked in 1987; that his last position, which he held for over 20 years, was as an inspector in QA; and that he had worked directly on the test/simulation of imported panels. The balance of his statement consisted of allegations identical to those contained in Mr. Wilson's statement. Supp. Ad. R. at 57.

Mr. Fabrizi stated that he had attended the hearing and had heard Mr. Poremba's testimony regarding the imported Canadian panels. Mr. Fabrizi was employed as a wireman and was directly involved in the wiring and testing of both Swissvale-manufactured and imported panels and had personally worked on upwards of twenty imported panels. He stated that the production of a Swissvale-made panel could take as long as a year because all of the components were fully manufactured and installed at Swissvale; the testing/simulation phase alone could take a number of months and involve upwards of 45 employees. The imported panels came with all of the component parts already installed and with the wiring complete. Testing was virtually eliminated. Supp. Ad. R. at 58.

Plaintiffs submitted Mr. Poremba's statement to supplement the affidavit he had previously submitted to Labor. He stated that he had been last actively employed by Union Switch in June of 1985 and had no further involvement with production since that time. A "debate" had taken

place in the Company in the early 1980's about whether to retain vertical integration or to outsource feeder operations. The "pro-outsourcing" group prevailed and actively searched for vendors, including foreign producers, who could supply parts and other operations more cheaply. Swissvale had manufactured vital and non-vital relays and used them extensively as component parts in making rail control systems, including display panels. By the time that he left, the Company had largely replaced the non-vital relays with the midtex relays purchased from an outside vendor. Supp. Ad. R. at 59. The bill of materials and process sheet contained in the record was for a single B-30 panel, approximately 19" x 40", which could take 2-4 weeks to produce. The Company built B-30 panels to control a small portion of a rail system, whereas rail system operators used a much larger display panel to control an entire system. An entire display panel could be many times larger than a single B-30 panel and could take many months to complete. During production the display panels underwent many types of operations throughout the entire plant, including various operations in the machine shop. They also underwent rigorous testing/simulation, which could involve numerous employees (especially from QA) on two shifts and could last a number of months. He could personally recall one Canadian panel. The Company, however, may have imported more. Supp. Ad. R. at 59-60.

According to Mr. Poremba, the Macon plant performed essentially distribution and final assembly and did not have the capacity to manufacture train-stops. The Batesburg plant was incapable of manufacturing operations (such as a train-stop kit) because both its equipment and machine shop were limited. Swissvale had the capability, machinery and skill levels to manufacture virtually anything, including train-stop kits or other equipment produced by CIS. Supp. Ad. R. at 60.[6] With regard to other affiants attesting to the negative effect on employment throughout the plant from imported panels, train-stop kits and relay frames, Mr. Poremba stated that Louis Serrepere, James Phelan and Tom Repic were former management employees who had worked under him when he was plant manager. Serrepere was highly knowledgeable about machine shop operations, as was Phelan with regard to Unit Shop II. Mr. Poremba stated that each had more direct day-to-day involvement with those respective areas than he. The Company transferred Mr. Repic to Batesburg after Mr. Poremba's retirement. Jim Fonzi, though not a management employee, was intimately familiar with the testing/simulation operations. He would have also worked on a daily basis with and had knowledge of the mid-tex relay. Mr. Poremba stated that he had reviewed the "affidavits" submitted by Louis Serrepere and James Phelan, and said that "[t]o the extent that I have knowledge of the facts and issues addressed therein, these statements appear to be true and correct to me." Supp. Ad. R. a 60.[7]

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[6] Labor had been directed to address the issue of whether train-stop kit manufacture was transferred domestically.
[7] These affidavits from a prior remand investigation are discussed *infra* p. 20.

II. Discussion

A. *Procedural Problems of Third Investigation:*

In *United Electrical II*, the court ordered Labor to submit its results on remand by April 30, 1990. This gave Labor a period of sixty days. On April 25, Labor filed a motion for a forty-five day extension. Plaintiffs opposed the motion. By Order of May 4, 1990, the court stated that it did

> not believe that defendant has given sufficient reason for such extension, nor is the court convinced that defendant has given this investigation sufficient priority. The court notes the fact that defendant originally asked for a sixty day period in its own request for a remand. Nevertheless, to avoid the possibility of an ill considered decision, the court extends the period of investigation to May 28, 1990, by which date defendant shall report its results on remand to the court. *No further extensions will be granted.* [Emphasis added].

Nevertheless, on May, 25, 1990, Labor filed a motion for a two week extension of time to submit its redetermination. While plaintiffs initially opposed the motion, they stated that they would have no objection provided that the court require Labor to consider the statements of Poremba, Fonzi, Fabrizi and Wilson. Labor opposed plaintiffs' request that the court require it to consider the statements. Alternatively, Labor cross-moved that if the court required it to consider the statements submitted by plaintiffs, that the Secretary be granted leave to investigate the allegations in the statements. Plaintiffs opposed Labor's cross-motion. The court granted Labor's motion for a two week extension and plaintiffs' request, ordering Labor to consider the affidavits.

After review of the administrative record, Mr. Marvin Fooks, Director of the Office of Trade Adjustment Assistance, recommended to the certifying officer that he issue a notice of negative determination on reconsideration. Confidential Supplemental Administrative Record at 61-65. The certifying officer followed the recommendation and, on June 11, 1990, issued a notice of negative determination on reconsideration. Supp. Ad. R. at 66-71.

The court would note that neither party followed the court's directions properly in all respects. Plaintiffs should have submitted affidavits in advance of the hearing. On the other hand, it is not clear that Labor afforded plaintiffs a clear opportunity to do so. Labor also was not justified in closing its hearing to testimony by plaintiffs' witnesses on the basis that it was forbidden by the court. Labor was perfectly free to allow plaintiffs to testify at the hearing and it should have done so if it intended to fully explore the remanded issues, as was its duty.

Requiring Labor to consider plaintiffs' post-hearing statements was intended to remedy Labor's rigid approach to the hearing. As for the request for further investigation, Labor had more than enough time to do a proper investigation.

With regard to "Mid-Tex relays," this issue was belatedly raised. It has never been the subject of the previous motions before the court and

it is much too late to open up a new avenue of investigation. If Labor was negligent in investigating this area, that claim should have been made earlier.

B. *L-Shaped Relay Frames:*

As indicated, in *United Electrical II* the court upheld Labor's determination that importation of Korean L-shaped relay frames did not contribute importantly to separations at the Swissvale plant. Plaintiffs ask the court to reconsider its decision.

As the court stated in *United Electrical II*, "[m]uch of the dispute revolves around a purchase order, dated March 17, 1986, in which the Company requested delivery of relay frames from a Korean producer. B-537-39.[8] The Company requested that the first and smallest order be delivered on May 15, 1986. The rest of the order was to be delivered at other times in 1986 and 1987. *Id.*" 731 F. Supp. at 1087 (footnote added). The parties disputed whether or not the purchase order was ever executed according to its terms. The court found this dispute to be irrelevant because "the first documented delivery date, May, 1986, was beyond the time that the Secretary should have completed her investigation." Plaintiffs' Objections to Defendant's Decision (P. Brief) at 21. The court reasoned that because Congress mandated that the Secretary complete her investigation in no more than sixty days, 19 U.S.C. § 2273(a) (1982), and that plaintiffs filed their petition on January 17, 1986, that "[h]ad this investigation not been mired in error and dispute, the Secretary's final determination would have issued before Korean relay frames had even been ordered. * * * The fact that litigation ensued does not extend the relevant time frame." 731 F. Supp. at 1089.

Plaintiffs contend that "the 60 day period within which Labor is supposed to complete its investigation is not a bar to consideration of the imported L-shaped relay frames." P. Brief at 21. They correctly point out, as the court did at length in *United Electrical II*, that Congress intended to ease qualifying criteria so that more workers would be certified than had been under the Trade Expansion Act of 1962. Plaintiffs point out that they

> first filed for certification on January 17, 1986. Labor, however, did not issue its *first* decision until August 4, 1986, well beyond the sixty day period. After Petitioners appealed the first decision, *Labor* acknowledged that it had not properly investigated the case and requested a remand. It did not issue a revised decision until May 1987. Two more decisions, each preceded by its own investigation have since followed. In the course of each [of] these investigations Labor gathered and considered evidence on import activity in 1984, 1985 and 1986. It then found that (other than the three certified sections) Plaintiffs had failed to demonstrate an increase in imports in either 1985 or 1986. (E.g. A-54, C-192). Under the facts of this case,

[8] The prefix "B-" refers to purchase orders in the administrative record.

> Labor's use of 1986 was plainly a reasonable exercise of its discretion.

P. Brief at 22-23. [Emphasis as set forth in original, footnotes omitted]. Plaintiffs further contend that they "do not maintain that Labor must continue to investigate each petition indefinitely merely because litigation ensues. However, where, as here, it was Labor that caused the delay, there is no reason why its decision should not encompass the period actually investigated." P. Brief at 23.

The court agrees that Labor exercised proper discretion in examining data from 1986. In conducting investigations, administrative agencies "consistently examine[ ] periods surrounding the POI[9] in order to understand the significance of activity within the POI." *Kerr-McGee Chemical Corp. v. United States*, 14 CIT ___, 739 F. Supp. 613, 626 (1990) (footnote added). Moreover, it may very well be proper for Labor to certify workers separated from, or threatened with separation from, employment due to imports ordered after the filing of the petition or even more than sixty days thereafter. The court does not believe, however, that the Secretary is obligated to do so as a general rule. Plaintiffs argue that "[e]xcluding 1986 from the scope of the investigation would have required Petitioners to file a new petition every sixty (60) days, even though they were in the midst of a legitimate, ongoing investigation which encompassed that year." P. Brief at 24. Such is not the case. Since the impact date of an investigation is a year prior to the petition date, 19 U.S.C. § 2273(b)(1) (1982), petition filed any time up to January 17, 1987, would have left no period during 1986 uninvestigated. Based on this record, the court does not find error in lack of certification based on imports first scheduled to arrive in May 1986.

Plaintiffs also fault Labor for refusing to investigate possible importation of Korean relay frames during the POI. P. Brief at 24. Assuming *arguendo* that it should consider the matter, which was not a subject of the remand order, the court does not believe that the evidence at the third investigation hearing, *see* Hearing Transcript (H-) at 52, 104-109 is sufficient to alter *United Electrical II*'s finding "that Labor's negative determination regarding importation of Korean relay frames is supported by substantial evidence in the record." 731 F. Supp. at 1089.[10]

C. *Italian Train-Stop Kits:*

Labor reaffirms its negative determination regarding the effect on employment of importation of Italian train-stop kits. Supp. Ad. R. at 68-69. Plaintiffs contend that the Secretary's decision is not supported by substantial evidence in the record. P. Brief at 15-20.

Evidence in the record compiled by Labor in the most recent remand investigation demonstrates that Swissvale did not produce the kind of system ordered from an Italian affiliate, and that this order allowed the Company to get a contract of which the train-stop order represented

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9 "Period of Investigation."

10 The hearing at most indicates *unsuccessful* outsourcing *attempts* with regard to Korean Relay Frames.

only five percent of the dollar value. Supp. Ad. R. at 10-11, 14, H-14-20, H-36-37, H-49, H-88-90.

Plaintiffs admit that "the Italian order was for an older, less sophisticated type of trainstop than was normally made in Swissvale." P. Brief at 16. They point out, however, that the record indicates that Swissvale had the capability of producing such a system, and that development would not have been necessary since the Company could have transferred the capability from the related Italian facility to Swissvale. There is also evidence in the record, however, that both development and transfer were either uneconomical or unfeasible. H-23-24.

The court notes that the rationale for Labor's current factual determination regarding train-stop kits bears little relationship to its previous "domestic transfer" theory. The current theory is that the Italian train-stops were not substitutable for Swissvale-produced train-stops and, therefore, they did not cause or threaten layoffs. Labor does adhere to its view that the "one-time order" did not affect the plant.

Substitutability and the one-time order approaches focus on imports to the Swissvale plant. These approaches ignore the broad question of the impact of importations into the American market of train-stops that were in competition with those made at Swissvale. Perfect substitutability under contract specifications is not necessary to a finding that products compete or that increased imports of such competing goods caused or threatened layoffs. If users specified a competing type of imported trainstop rather than a domestic type, thus significantly contributing to employment declines at Swissvale, certification should have occurred.

D. *Canadian Office Control Panels:*

Labor reaffirms its determination that importation of Canadian office control panels did not contribute importantly to worker separation at Swissvale except in departments 390, 222 and 110. Supp. Ad. R. at 67-68. The Secretary's decision here is unacceptable.

According to the certifying officer, "[d]uring the investigation, the company officials were focusing on the big picture—$137 million a year in business. Panel imports were infinitesimal (less than one-half of one percent) at $300,000." Supp. Ad. R. at 67. It is unclear if the officer meant this as a reason why imported panels were not a basis for a larger certification, or if the officer meant merely to explain why Company officials did not originally acknowledge that Union Switch used imports. In any case, the $300,000 figure bears no relation to any data involving production at Swissvale, and it may not be considered. The figure is derived from handwritten figures on blank sheets of paper which do not appear to be regular business documents. At the hearing, Mr. Kopsa stated that he did not know how this figure was derived. The figure is also contradicted by testimony as to import impact and by Labor's certification of three sections of the plant based on imported panels. Apart from inherent nonreliability, the figures are simply a substitute for testimonial evidence of the kind upon which the court, because of past error, in-

structed Labor not to rely unless the author of the statement appeared at the hearing. 731 F. Supp. at 1094. Therefore, the figure may not be accepted as an indication of the value or quantity of imported office panels affecting the Swissvale plant.

Another reason for Labor's denial of expanded certification seems to be continued reliance on a process sheet for a small "B-30" panel as opposed to a large office control panel which is the important panel at issue. Labor now claims that the certifying officer was merely explaining the rationale of the former investigations. The certifying officer, however, seems to refer to the determination at bar: "This *is* based on the process sheet and testimony." Supp. Ad. R. at 67 [emphasis added].

In addition, it appears that the testimony to which the certifying officer refers is that of Mr. Poremba, who testified that he could recall only one imported panel, that it was to fill an order for kind of panel not produced at Swissvale, and that Swissvale performed most of the work on it in any case. The court cannot understand, if this represents the panel imports from Canada, why Labor certified any sections at Swissvale. As it appears that Labor continues to stand by its determination that imports of Canadian panels caused separations in three sections of the plant, Supp. Ad. R. at 67, this one panel cannot represent the whole picture.

Mr. Poremba's earlier affidavit indicated that in the one imported panel that he recalled, much of the value was added at Swissvale. Supp. Ad. R. at 9-10. His oral testimony at the court ordered hearing held on May 23, 1990, indicates that the specifications for the outer shell of the particular panel required technology unavailable at Swissvale. H-60-62. His later affidavit indicates that panel production involved many sections of the plant, and that there may have been more imported panels than the one that he remembered. Supp. Ad. R. at 59-60. The certifying officer states that "[s]ince the subsequent affidavit by Mr. Poremba does not explicitly or directly contradict his earlier affidavit and oral testimony, I accept Mr. Poremba's earlier affidavit and oral testimony as persuasive." Supp. Ad. R. at 68.

Apparently the certifying officer reads Mr. Poremba's testimony as indicating that jobs were not lost at Swissvale due to imported panels because of the further work that the panels required when they arrived at Swissvale. This reading conflicts with the testimony of Messrs. Louis Serrepere and James Phelan, former management employees who worked under Mr. Poremba, whose affidavits he reviewed. Mr. Poremba stated that "[t]o the extent that I have direct knowledge of the facts and issues addressed therein, these statements appear to be true and correct to me." Supp. Ad. R. at 60. According to Mr. Phelan, imported panels eliminated nearly 20% of the jobs in Unit Shop II, reduced the workload of the Quality Assurance section by one third, and significantly reduced

the workload of other sections, such as storeroom. C-72-73.[11] Mr. Serrepere testified that panel imports eliminated jobs in Unit Shop III. C-79. Given Mr. Poremba's statement that these men "would have been more directly involved on a day to day basis with those respective areas than I was * * *" and that "[e]ach of these men, in my opinion, is a person of integrity, with a reputation for honesty," Supp. Ad. R. at 60, the court cannot understand how the certifying officer finds no contradiction between its apparent reading of Mr. Poremba's pre-Hearing affidavit and Hearing testimony, and his post-Hearing affidavit. Moreover, the certifying officer's apparent reading of Mr. Poremba's testimony conflicts with the post-Hearing affidavits of Messrs. Bruce Wilson, James Fonzi and John Fabrizi, who testified that the imported panels came into Swissvale with the wiring and component parts, which used to be made at Swissvale, already in place, and that these imports eliminated twenty percent of the jobs throughout the plant. Supp. Ad. R. at 56-58.

The court rejects as unsupported the certifying officer's apparent conclusion that the particular panel about which Mr. Poremba testified is representative of Swissvale panel imports. Mr. Poremba testified about the only Canadian panel that he recalled; he did not claim that this was the only imported panel. Supp. Ad. R. at 60. Mr. Fabrizi claimed to have worked on over twenty panels which came with all the component parts already manufactured. Supp. Ad. R. at 58. *See also* Mr. Fabrizi's testimony at C-49-51. In the first court-ordered hearing held on April 16, 1987, Mr. Bruce Wilson testified that initially the Canadian panels required much work at Swissvale, but that they later came into Swissvale as a finished product and were eventually shipped to customers directly from Canada. Transcript at 40. *See also* Mr. Fabrizi's testimony at the 1987 hearing, Transcript at 42-68. It appears that Mr. Poremba, who did not work as closely with panels as did plaintiffs' affiants and was not actively employed at Union Switch during the latter half of the POI, recalls one of the early imports.

It may be that the certifying officer reads Mr. Poremba's testimony indicating that the kind of panels imported from Canada, which apparently used a kind of outer shell not produced at Swissvale, did not compete with Swissvale's product. Mr. Poremba himself testified, however, that much engineering and testing, which Swissvale was fully capable of performing, remained to be done after the panel arrived. If jobs were lost because this work was later performed in Canada, then these workers should be certified. Moreover, Labor apparently has already found competition between imported Canadian panels and those made at

[11] Mr. Phelan's testimony as to the reduction of the work in the storeroom is backed up by other evidence in the record. C-59. The court also notes testimony that imported panels caused half the drafting section at Swissvale to be laid off. C-49-54. While some of the information in the record is not time specific, data throughout the various investigations indicate that job reductions occurred from 1983 through 1986 due to imports.

Swissvale, because it certified the Swissvale sections involved in sheet metal fabrication and plating.[12]

According to the Director of the Office of Trade Adjustment Assistance,

> [i]nvestigation findings show that the need for the restructuring of the Swissvale plant came from an inefficient Swissvale plant, the need for a more favorable labor climate, * * * and from flat domestic and export markets, * * * resulting, in part, from lower federal spending for transit programs * * * The Swissvale shutdown was the result of 1) outsourcing to partner vendors of feeder operations such as machining, sheet metal, plating and heat treat; 2) the transfer of ground equipment assembly and test to Georgia; 3) the transfer of relay assembly and test to South Carolina and 4) the establishment of a new product service and distribution center in Georgia.

Supp. Ad. R. at 63 (citations omitted). Some of these conclusions are suspect. In any case, while there may have been other reasons, besides imports, for layoffs at Swissvale, petitioners should be certified if increases of imports "contributed importantly" to worker separations during the investigatory period. 19 U.S.C. § 2272(a)(3) (1988). For the purposes of part (3) of this statute both at the time the petition was brought and presently as amended, " 'contributed importantly' means a cause which is important but not necessarily more important than any other cause." 19 U.S.C. § 2272(b)(1) (1988).

Were this simply a matter of the weighing of competent and relevant conflicting testimony and assessing its credibility, the court would uphold Labor's determination. The problem, however, is not Mr. Poremba's credibility. What troubles the court, rather, is the certifying officer's expansive and seemingly unjustified reading of his testimony.

Perhaps most troubling is that Labor does not seem to have considered the statements submitted by plaintiffs after the hearing, despite the court's order that it do so. The Secretary has given them no weight, despite the fact that no specific evidence in the last remand investigation appears to contradict them particularly with regard to Canadian office panels.[13]

We note that "[t]he judiciary can scarcely perform its assigned function, limited though it is, without some indication not only of what evidence was credited, but also whether other evidence was rejected rather than simply ignored." *Brown v. Bowen*, 794 F.2d 703, 708 (D.C. Cir. 1986) (citation omitted). Perhaps the Secretary gives the affidavits no weight because they were not sworn. As the court indicated, Labor was ordered to consider them as a remedial measure, not because they were otherwise acceptable. Considering that Labor does a great deal of its in-

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[12] As with train-stops, Labor made no finding of lack of *competition* between the foreign product and the Swissvale product.

[13] The court does not consider Mr. Kopsa's general conclusions, unsupported by specific data, about lack of employment declines due to imports as substantial evidence.

vestigation by means of telephone inquiry and unsworn submissions, lack of oath cannot be a irremediable barrier to consideration.[14]

Mr. Poremba's testimony is either supportive of certification or incompetent because of lack of direct knowledge. As this court has indicated, "[s]tatements * * * that are inconsistent, uncorroborated, *not entirely based on personal knowledge*, and possibly biased do not constitute substantial evidence."[15] *Former Employees of Tyco Toys v. Brock*, Slip Op. 88-114 at 4 (CIT August 26, 1988) [emphasis added]. Mr. Kopsa and Mr. Poremba should not be consulted anew. If Labor has some reason to disbelieve plaintiffs' affiants it certainly has not made this clear except by vague references to inconsistencies and lack of detailed data. Labor, however, failed during earlier investigation to follow up with plaintiffs' affiants and to seek more detailed information. Labor, as investigator, was required to do this. If specific detail is lacking, Labor must bear the responsibility.

To avoid any questions as to the sincerity and accuracy of the new statements submitted by plaintiffs, plaintiffs are directed to provide new affidavits, except from Mr. Poremba. They are to be sworn and are to contain time-specific information, if the affiants can recall such information. If the affidavits continue to support certification, Labor is to certify the Quality Assurance section.[16] These statements, together with those of Mr. Phelan and Mr. Poremba, along with other record evidence, support the conclusion that imports contributed importantly to layoffs in this section. There is no substantial evidence to the contrary. Labor may not investigate endlessly in an effort to gather such information.

Labor shall then concentrate on determining which other sections of the plant should be certified. If distinctions cannot be drawn because of loss of records and witnesses cannot remember exact times of layoffs in various sections, the entire plant must be certified because Labor is responsible for the delays and loss of records.[17]

Labor has thirty days to complete this investigation. If it has plans for investigation beyond obtaining sworn statements as directed by the court it must request court permission to proceed. As soon as the investigation is complete the court will review the result. Labor has again failed in its duty to investigate fairly. If the entire plant is not certified based on Canadian office panels, Labor shall then turn its attention to train-stops and determine if increased imports of competing train-stops to the American market in general, as well as to Union Switch, contributed importantly to employment declines at Swissvale.

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[14] The court may award benefits if the agency does not explain its refusal to credit relevant testimony. *See Ghazibayat v. Schweiker*, 554 F. Supp. 1005 (SDNY 1983) (disability benefits awarded by court after administrative law judge had not explained his refusal to credit testimony of plaintiff and his physicians regarding plaintiff's pain).

[15] The court makes no finding of bias.

[16] The fact that layoffs were recorded in QA in May 1986 supports the conclusion that they were threatened earlier. Labor did not do any investigation which would support the contrary view.

[17] The court notes the numerous other sworn affidavits and testimony in the record which also support plaintiffs' position on this issue.

At this point in time, it is highly unlikely that a true picture of the impact of imports on employment at Swissvale will ever be known. It may be that more workers will be certified as eligible than should have been if the proper documentary evidence was obtained and the proper avenue of investigation followed at the outset. But plaintiffs may not be penalized because of Labor's initial errors and easy grasp of erroneous data indicating lack of eligibility.

(Slip Op. 90-132)

ZENITH ELECTRONICS CORP., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 88-02-00122

MEMORANDUM OPINION AND ORDER

[Motions for judgement on the administrative record granted in part.]

(Decided December 19, 1990)

Frederick L. Ikenson, P.C. (*Frederick L. Ikenson* and *J. Eric Nissley* of Counsel) for plaintiff Zenith Electronics Corporation.

Paul, Weiss, Rifkind, Wharton & Garrison (*Robert E. Montgomery, Jr.* of Counsel) for plaintiffs NEC Corporation and NEC Home Electronics (U.S.A.), Inc.

Baker & McKenzie (*Thomas P. Ondeck* and *Arthur L. George* of Counsel) for plaintiffs Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

Siegel Mandell & Davidson, P.C. (*Brian S. Goldstein*, *Judith M. Barzilay* and *David Newman*, of Counsel) for plaintiff Fujitsu General Ltd.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division (*Velta A. Melnbrencis*, attorney) for the defendant.

Weil, Gotshal & Manges (*Stuart M. Rosen*, *A. Paul Victor* and *Charles H. Bayar* of Counsel) for Amici Curiae Matsushita Electric Industrial Co., Ltd., et al.

WATSON, *Judge*: This consolidated action covers challenges to antidumping duty determinations and involves Zenith Electronics Corporation ("Zenith"), an American manufacturer of television sets, and three Japanese manufacturers, who are Fujitsu General, Ltd. ("Fujitsu"), Mitsubishi Electric Corporation ("Mitsubishi"), and NEC Corporation and the related subsidiaries of the Japanese manufacturers. The Court has also permitted the participation of Amici Curiae.[1]

The parties contest the final determination of the United States Department of Commerce ("Commerce"), International Trade Administration ("ITA"), in *Television Receivers, Monochrome and Color, from Japan: Final Results of Antidumping Duty Administrative Review*, 53

[1] Briefs of Amici Curiae in support of NEC's motion for judgment upon the agency record have been filed by Victor Company of Japan, Ltd. and U.S. JVC Corp., and by Matsushita Electric Industrial Co., Ltd.; Panasonic Company and Quasar Company, divisions of Matsushita Electric Corporation of America; Panasonic Hawaii, Inc.; and Panasonic Sales Company, a division of Matsushita Electric of Puerto Rico, Inc.

Fed. Reg. 4050 (February 11, 1988). Commerce's determination stems from an administrative review of alleged dumping of television receivers, monochrome and color, from Japan, covering five manufacturers and/or exporters, and the periods between April 1, 1982 through March 31, 1983 and March 1, 1985 through February 28, 1986. Commerce identified a dumping margin, and assessed antidumping duties. A cash deposit was required of the manufacturers, pursuant to Commerce Department regulations. 19 C.F.R. § 353.48 (1988).

Presently before the Court are motions by Zenith, Fujitsu, NEC and Mitsubishi for judgment upon the agency record in Case No. 88-02-00122. A variety of issues are involved, related to ITA's manner of calculating and determining the antidumping duty.

Zenith asserts that Commerce must adhere to this court's ruling in *Zenith Elecs. Corp. v. United States*, 10 C.I.T. 268, 633 F. Supp. 1382 (1986) ("Zenith I"), which provides that under 19 U.S.C. § 1677a(d)(1)(C) (1980), the adjustments for a Japanese commodity tax must be calculated by (1) increasing the United States price ("USP") by the amount of foreign taxes forgiven upon exports rather than decreasing the Foreign Market Value ("FMV") by that amount, and by (2) "capping" or limiting the adjustment to the amount of such taxes that are actually included in the home market price of the comparison merchandise, or "passed through" to the consumer in the home market.[2] Claiming that the Department of Commerce ignored the court's ruling in Zenith I, Zenith asserts that Commerce erred by (1) using a circumstances of sale adjustment to neutralize the effect of the tax adjustment, and (2) by failing to cap the tax adjustment to USP at the amount of tax added to, included in, or actually "passed through" in the home market price.

Fujitsu claims that Commerce correctly made the circumstances of sale adjustment for commodity tax in the home market, and that it should also have done so in calculating the cash deposit rate for estimated dumping duties.[3]

Fujitsu and NEC argue that Commerce erred in failing to adhere to a settlement agreement entered into with twenty-three importers of Japanese color television receivers[4] on April 28, 1980 ("Settlement Agreement"). In particular, they claim that in calculating the dumping margin in this case, Commerce departed from the "traditional methodology" for such calculations to which it was bound by the Settlement

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[2] The relevant provision of the statute states:

> The purchase price and the exporter's sales price shall be adjusted by being * * * increased by * * * the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.

19 U.S.C. § 1677a(d)(1)(C).

[3] Mitsubishi and NEC also assert that Commerce erred in failing to calculate this adjustment in its determination of the cash deposit rate, as it did in its duty assessment calculation.

[4] Fujitsu and NEC were among the importers.

[5] Amici Curiae support NEC's claim that Commerce wrongfully abandoned its previously employed "traditional methodology" by making an unwarranted and retroactive change in its calculating practice.

Agreement.[5] The defendant, United States, opposes this argument, claiming that the "traditional methodology" referred to a departure from the commodity tax method for deriving the FMV, and a return to the previously used method of adjusting U.S. and Japanese prices pursuant to the statute. NEC also argues that Commerce applied fixed rules to some of its determinations without complying with the Administrative Procedure Act.

Fujitsu and NEC further argue that in its calculation of the FMV to be compared to the USP, Commerce wrongfully considered *all* markets in Japan, rather than "*principal* markets," which compose the "ordinary course of trade." Fujitsu claims that farmers' cooperatives as well as small retail stores in rural areas of Japan should have been excluded from the calculations because they are not principal markets, and operate outside of the ordinary course of trade.

Remaining issues for which the parties seek relief are:

—Fujitsu claims that imputed finance costs in the home market should be calculated, and FMV adjusted appropriately.

—Fujitsu claims that Commerce should have included indirect selling expenses (attributable to its Domestic Marketing Group) in the exporter's sales price (ESP) offset claim.

—NEC claims that Commerce erred in disallowing its claimed adjustment for advertising and sales promotional expenses; in refusing to make "level of trade" adjustments; and, in failing to deduct the full amount of NEC's home market warranty and inland freight expenses from the FMV.

—Mitsubishi claims that Commerce misinterpreted Japanese commodity law, and based its calculation on transfer prices to related sales subsidiaries rather than sales by a related company to an unrelated customer; incorrectly used a time period for calculating advertising expense other than the fiscal year to which this review pertains; incorrectly calculated home market freight expense; erred in not adjusting for differences in circumstances of sale as mandated by *Timlcen Co. v. United States*, 11 C.I.T. 786, 673 F.Supp. 495 (1987); incorrectly deemed warranty labor payments to a related warranty service company indirect expenses; and made several technical errors.

Background

The Antidumping Act[6] provides relief to a domestic industry which is materially injured or threatened with material injury by the sale of foreign goods in this country at less than fair value ("LTFV"), or below the market value of those goods in the country of exportation. The Act authorizes the Secretary of the Treasury to determine when such dumping occurs, or is likely to occur, and to impose a duty in such circumstances to eliminate the margin of dumping. 19 U.S.C. § 1673 (1980). The Act is not intended to penalize the foreign industry, but to protect

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[6] 19 U.S.C. 1671 et seq.

the domestic industry which is likely to be injured or prevented from being established by the sale of foreign goods in the United States market at LTFV.[7]

An antidumping duty investigation is commenced when the administering authority determines that it is warranted. 19 U.S.C. § 1673a. Except where there is a negative finding and review is dismissed, there is a preliminary determination, 19 U.S.C. § 1673b, generally followed by a final determination. 19 U.S.C. § 1673d. An antidumping duty is then assessed and imposed, and the deposit of estimated duties is required pending liquidation of entries of merchandise. 19 U.S.C. § 1673e.

The amount of antidumping duty, imposed to correct the "dumping margin," is determined by comparing the FMV to the USP. 19 U.S.C. § 1677b. In making this comparison, various adjustments are made for certain costs, expenses and duties, pursuant to statute.[8] The "absolute dumping margin" for a sale is the amount by which FMV exceeds USP after the appropriate upward and downward adjustments are made, pursuant to statutory provisions and Commerce Department regulations.

The dumping margin should not be increased as a result of taxes assessed on the home market but forgiven on export sales by the country of exportation. Thus, the statute provides that an offset adjustment should be used in calculating USP to compensate for such a home market tax, stating that the purchase price and exporter's sales price shall be increased by:

> [Tlhe amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.

19 U.S.C. § 1677a(d)(1)(C).

In *Zenith I*, this Court discussed that issue at length, recognizing that the above adjustment consists of two components. First, the USP is to be

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[7] *See* R. Sturm, Customs Law and Administration § 48.1(1990).

[8] Section 1677a(d) provides:

The purchase price and the exporter's sales price shall be adjusted by being—

(1) increased by—

(A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States,
(B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reasons of the exportation of the merchandise to the United States;
(C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United states, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation.

(2) reduced by—

(A) except as provided in paragraph (1)(D), the amount, if any, included in such price, attributable to any additional costs, charges, and expenses and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; and
(B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the country of exportation on the exportation of the merchandise to the United States other than an export tax, duty or other charge described in section 1677(6)(C) of this title.

increased by the amount of foreign taxes imposed directly upon the exported merchandise * * * which have been forgiven (rebated or not collected) because the merchandise was exported to the United States." *Zenith I*, 10 C.I.T. at 272, 633 F. Supp. at 1385. In other words, the statute does not provide for the FMV to be *reduced* by the amount in question, but for the USP to be *increased*. "Second, the adjustment is to be limited or 'capped' by the amount that such taxes are added to or included in the price of comparison merchandise sold in the home market." *Id.* This means that when the foreign manufacturer absorbs some or all of the tax imposed, the increase to USP is not to exceed the amount of the tax which is actually "passed through" to the foreign market consumer.

In part, this case is concerned with Commerce's interpretation of the tax adjustment portion of the antidumping statute. Additional issues, listed above, pertain to other adjustments made in calculating the absolute dumping margin. In certain instances, it is the foreign manufacturer or importer's burden to provide commerce with adequate information to enable it to determine whether expenditures in the foreign market qualify as reductions to the FMV provided for by 19 U.S.C. § 1677(a)(A)(2).

ITA PROCEEDINGS

The ITA published its final determination on February 11, 1988,[9] addressing comments received in response to its preliminary results[10] from Zenith, NEC, Mitsubishi and Fujitsu.[11] The arguments presented by parties in this case are responsive to various positions taken by ITA in that determination. We refer only to those determinations which are now being challenged.

In its final determination, Commerce agreed that the statute requires that the commodity tax forgiven by reason of export must be added to USP. However, it states that, "[t]o avoid artificially inflating or deflating margins, we made circumstances-of-sale adjustments, where appropriate." 53 Fed. Reg. at 4051. Commerce also states that it disagrees with this court's decision in *Zenith I* that foreign taxes which are rebated or forgiven upon exportation of merchandise should be capped at that amount actually "passed through" to the consumer in the foreign market. Commerce gives several reasons for its decision to continue "to assume that all indirect taxes in the home market are passed through to the ultimate customers." *Id.*

In stating its position regarding the effect of the 1980 settlement agreements and its obligation to adhere to a "traditional methodology" for calculating FMV, Commerce refers to its previous determination in 52 Fed. Reg. 8940, 8942 (March 20, 1988). There, Commerce states "the

[9] 53 Fed. Reg. 4050 (1988).

[10] Published at 52 Fed. Reg. 27,234 (July 20, 1987).

[11] The ITA also received comments on its preliminary determination from some respondents regarding mathematical or clerical errors. Such errors were corrected, and are not specifically addressed in the final determination. 53 Fed. Reg. 4051.

phrase 'traditional methodology' is limited to the calculation of foreign market values based upon information and data supplied by Japanese respondents." *Id.* at 8942. Commerce asserts that the settlement agreement binds it to use a "traditional methodology" only to the extent that "[i]t precludes future use of the 'commodity tax' method in calculating FMV." *Id.*

Commerce refused to exclude sales to farmers' cooperatives and small retail stores in Japan in calculating FMV, claiming that no evidence was presented to show that these sales were outside of "principal markets," or the "ordinary course of trade." *Id.* at 4053. Commerce also refused to make any adjustment for Fujitsu to account for imputed financing costs in the home market, claiming that the data necessary for calculating such costs was not provided.

In response to Fujitsu's request that an adjustment be made for home market indirect selling expenses (attributable to the Domestic Marketing Group) in the ESP offset, Commerce asserts that Fujitsu first made this claim in its pre-hearing brief. Commerce considers that too late in the review to be considered or verified. *Id.* at 4054.

Commerce disallowed NEC's claimed adjustments for home market advertising and sales promotion expenses, because they could not be satisfactorily verified. *Id.* at 4053. In regard to deductions from FMV for home market warranty expenses, Commerce found that the labor portion of NEC's warranty claim was performed by a related service company, and thus was a fixed cost not directly related to sales in this period. As such, Commerce claims it was included in the ESP offset. *Id.* at 4053-54. Commerce agreed with Zenith's claim that the labor portion of Mitsubishi's home market warranty claim consists of expenses incurred by a related service company. For that reason, Commerce found they should be treated as an indirect expense. *Id.* at 4052.

Commerce claims that it correctly refused to make a level of trade adjustment to account for NEC's sales companies profits in the foreign market.[12] However, those expenses were claimed in the ESP offset, as Commerce considers them indirect selling expenses. *Id.* at 4053.

Commerce disallowed NEC's claim for deduction of home market inland freight expenses, finding that the expenses could not be satisfactorily verified. *Id.* at 4054.

Circumstance of Sale Adjustment

In its determination, Commerce concedes that "the amount of commodity tax forgiven by reason of the export of televisions to the United States must be added to USP under the Statute." 53 Fed. Reg. at 4051. That is in accordance with the statute, and with the Court's clear interpretation of that portion of the statute, as set out in *Zenith I*, 10 C.I.T. 278-79, 633 F. Supp. at 1389. However, that is not the operative part of the statute which we are concerned with here. Rather, it is Commerce's

[12] NEC sought deductions from FMV for profit, selling, general and administrative expenses incurred by its sales companies.

alleged attempt to nullify the effect of that requirement which is in dispute.

Commerce states that in order "[t]o avoid artificially inflating or deflating margins, [it] made circumstances-of-sale adjustments where appropriate." 53 Fed. Reg. at 4051. In effect, that policy tends to avoid the directive of the statute, rather than to avoid "artificially inflating or deflating margins." The statute clearly provides for adjustments to price based on taxes rebated upon exportation, directing that the USP be "increased by * * * the amount of any taxes imposed in the country of exportation directly upon the exported merchandise * * * which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States." 19 U.S.C. § 1677a(d)(1)C).

Although failing to attribute its circumstance of sale determination to a particular clause, Commerce apparently believes it finds the authority for the adjustment in the statute. That section states:

> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value * * * is wholly or partly due to—
>
> (b) other differences in circumstances of sale; then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4)(C).

This Court need not completely restate its position on the issue of tax-related circumstances of sale adjustments, which was examined in great detail in *Zenith I*. The Court finds that § 1677b(a)(4)(c) is not an omnibus provision to be used by the parties for whatever adjustment they seek to effect. Rather, the statutory significance of "other circumstances of sale" is to provide a means for addressing those *items not otherwise included in the statute*. Since the adjustment for tax rebated by reason of exportation is specifically provided for in § 1677a(d)(1)(C), there is no justification for readjusting it under a provision for "other differences in circumstances of sale."[13]

Zenith asserts that in *Zenith I*, it argued that "the Act does not contemplate complete tax neutrality in all instances and that the differences in circumstances of sale adjustment authority cannot be exercised to nullify the tax adjustment." Brief for Plaintiff at 7. This Court agrees, as fully discussed in that opinion. *See Zenith I*, 633 F. Supp. at 1392-93. That fact that the relevant provisions of the antidumping law provide for adjustments to compensate for actual taxes rebated upon exportation indicates that the desired result should come as close as possible to an adjustment pertaining to an actual occurrence. It defies logic to as-

[13] Commerce Department regulations do not include rebate of foreign market tax upon exportation as a circumstance of sale triggering this adjustment. Consistent with the court's interpretation, the regulation states:

> Examples of differences in circumstances of sale for which reasonable allowances generally will be made are those involving differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising or other selling costs. Reasonable allowances also generally will be made for differences in advertising and other selling costs of a seller unless such costs are attributable to a later sale of the merchandise by a purchaser.

19 C.F.R. § 353.15(b)(1988).

sume that Congress then provided that the adjustment could be rendered meaningless by a difference in circumstance of sale adjustment.[14]

Commerce misunderstands the significance of the Court's previous determination regarding this issue. The issue is not whether Commerce is bound to follow *Zenith I*. Rather, the Court's interpretation of the law as set out in *Zenith I* remains this Court's interpretation of the law. Absent a reversal of the specific point by the Court of Appeals, this Court considers that interpretation correct. We are not concerned with whether Commerce "misbehaved" in failing to follow a previous determination. We are only concerned with seeing that the law receives its correct interpretation.[15] Contrary to Commerce's belief, there is no indication that the legislative history or GATT support its use of circumstance of sale adjustment, and the Court holds that its method is contrary to the statute.[16]

Commerce was correct in adding the amount of tax forgiven upon exportation to the USP, rather than deducting it from the FMV. The statute is clear on this,[17] and the parties do not dispute it. Furthermore, the Court has recognized that *Zenith I* requires it. *See AOC Int'l, Inc. v. United States*, 721 F. Supp. 314, 321-22 (CIT 1989); *Daewoo Electronics Co. v. United States*, 712 F.Supp. 931, 955 (CIT 1989). Thus, there is no question that "the provision calls for an upward adjustment to USP (rather than a downward adjustment to FMV) in the amount of tax that would have been assessed on the exported merchandise had it been sold in the home market." *Zenith I* 633 P. Supp. at 1389.

The issue is whether a circumstance of sale adjustment was appropriately made in order to achieve "tax neutrality." For reasons set out here and in *Zenith I*, the Court holds that it was not. Not only does the antidumping law specifically provide the manner in which such tax should be treated, 19 U.S.C. § 1677a(d)(1)(C), but there is nothing which indicates that this tax is again provided for under other differences in circumstances of sale." 19 U.S.C. § 1677b(a)(4)(B). Commerce's own regulations give no such indication, *see* 19 C.F.R. § 353.15(b), and such tax is not included in its list of examples of differences in circumstances of sale. *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1574 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

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[14] In a recent case, a plaintiff asked the Court the direct the ITA to grant an adjustment to USP for tax rebated upon exportation, pursuant to § 1677a(d)(1)(C). Plaintiff requested that in the alternative, a circumstance of sale adjustment should be required, pursuant to § 1677b(a)(4)(B). Finding that the evidence supported the adjustment for tax rebate, the Court failed to reach the circumstance of sale issue. *See Industrial Ouimica Del Nalon, S.A. v. United States*, 729 F. Supp. 103 (CIT 1989).

[15] The Court considers arguments regarding the nature of "dictum" superfluous. *Zenith I* represents the Court's interpretation of the law then and now.

[16] In *Sawhill Tubular Div. Cyclops Corp. v. United States*, 11 C.I.T. 491, 666 F. Supp. 1550 (1987), the Court held that the ITA's determination to make a circumstance of sale adjustment was reasonable. In that case, the claimed adjustment related to certain export payments identified alternatively in the record as an "uncollected or rebated tax and duty," an "import duty drawback," a "difference in material cost," and a "circumstance of sale." *Id.* at 1551 n.l. In reaching its decision, we will assume the Court, although silent on the point, did not select "rebated tax and duty" as the operative alternative.

[17] 19 U.S.C. § 1677a(1)(C).

In *Zenith I*, the Court recognized that "[t]he antidumping law does not support the proposition that a tax differential generated by actual dumping constitutes an adjustable difference in the circumstances of sale under § 1677b(a)(4)(B)." *Zenith I*, 633 F.Supp. at 1393. No support for any other reading of the statute is evident, thus no adjustment for commodity tax assessed on sales in the foreign market and rebated upon exportation shall be allowed.

In another aspect of its determination, Commerce concluded that it would "continu[e] to assume that all indirect taxes in the home market are passed through to the ultimate customers." 53 Fed. Reg. at 4051. Stating disagreement with the Court's previous ruling, Commerce refused to "attempt to measure the amount of tax 'passed through' to customers in the Japanese market for several reasons."[18] *Id.* Commerce asserts three reasons for its refusal to follow *Zenith I*'s directive:

> (1) [W]e do not agree that the statutory language limiting the amount of the adjustment of the commodity tax "added to or included in the price" of televisions sold in Japan requires the Department to measure the incidence of the tax in an economic sense.
> (2) [A]pplying such an interpretation would be contrary to the obligations of the United States under the GATT Dumping Code.
> (3) [M]easuring the incidence of the commodity tax in Japan would be an enormous and extremely complex task.

Id.

Zenith argues that by "calculat[ing] the adjustment by multiplying the ex-factory price by the tax rate and adding the result to USP," Commerce "completely ignored this Court's express ruling that the statute requires capping the adjustment at the amount of tax added to or included in the price of home market comparison merchandise." Brief for Plaintiff at 11. Commerce, however, asserts that "the statute does not require that the adjustment to U.S. price be capped by 'the amount' of tax added to or included in the home market price." Defendant's Memorandum in Opposition at 53.

In fact, and as discussed above, the statute's directive on this issue is clear. In no uncertain terms, the statute provides:

> The purchase price and the exporter's sales price shall be adjusted by being * * * increased by * * * the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but *only to the extent that such taxes are added to*

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[18] Commerce states that it will not conform to *Zenith I*'s ruling on this issue "pending a final decision on-whether the Government will appeal." 53 Fed. Reg. 4051. Since its determination, the Government's appeal has been dismissed as failing to meet the case or controversy requirement. *See Zenith Elecs. Corp. v. United States*, 875 F.2d 291 (Fed. Cir. 1989). Upon remand pursuant to *Zenith I*. Commerce's calculations resulted in a finding that 100% of the tax had actually been passed through to the foreign market consumer. That being so, the Court of Appeals refused to issue an "advisory opinion" on *Zenith I*'s requirement that Commerce measure the tax pass-through. *Id.* at 293.

> *or included in the price of such or similar merchandise when sold in the country of exportation.*

19 U.S.C. § 1677a(d)(1)(C) (emphasis supplied).

This question may be resolved by referring to the Court's lengthy interpretation of the statute's pass-through clause in *Zenith I.* As stated there:

> Congress had become aware that indirect taxes, including taxes imposed directly on merchandise, often were not fully shifted forward to purchasers; and Congress did not want the adjustment for such a tax to increase United States price calculations by an amount greater than the price increase which the tax generated in comparison home market sales.

Zenith I, 633 F. Supp. at 1396.

Commerce incorrectly justifies its failure to consider pass-through by claiming that "C-O-S adjustment[s] ha[ve] precisely the same effect on the absolute margin as the 'cap' [in that] they prevented that addition from reducing the margin by an amount by which the imputed tax on the exported model exceeded the tax on the home market model." Defendants' Memorandum in Opposition at 54. It is not Commerce's place to determine that substitution is an acceptable alternative to adherence to statutory directive, using its own means to achieve what it claims are the statutory ends.

Commerce's reasons for refusing to follow the statute's directive, as clarified in *Zenith I*, are unacceptable. The statutory language certainly requires that the "incidence of tax" passed through to consumers in the home market be measured. If Commerce was correct, "then the statute's requirement that these rebates create an adjustment only to the extent the cost of the tax is passed on would be meaningless." *Huffy Corp. v. United States*, 10 C.I.T. 214, 221, 632 F. Supp. 50, 56 (1986). *See also Atcor, Inc. v. United States*, 11 C.I.T. 148, 158, 658 F. Supp. 295, 303 (1987).

Finally, we cannot excuse Commerce from adhering to statutory directives because doing so would "be an enormous and extremely complex task." The Court need not explain why that is no excuse for disregarding the law. Furthermore, correct interpretation of the statute is not contrary to GATT.

As stated in *Zenith I*, "[t]o permit the ITA to assume, without any evidentiary basis, that home market price always reflects the full amount of such taxes would effectively render the pass-through clause a nullity and would defeat the express will of Congress." 633 F. Supp. at 1399. This Court sees no reason to alter that interpretation of the statute, and Commerce is bound to apply it lawfully.

Traditional Methodology

As previously stated, Fujitsu and NEC claim that Commerce failed to adhere to the April 28, 1980 Settlement Agreement which it entered into

with a number of Japanese importers.[19] The departure claimed is that Commerce failed to use the "traditional methodology" in its calculations in the manner agreed to in the Settlement Agreement. The government's response is, in essence, that the "traditional methodology" refers not to an exact manner of calculation, but to a departure from the commodity tax method of deriving the FMV and a return to the method which was previously used.

In reaching its determination, the ITA refers to its finding in 52 Fed. Reg. 8940 (1987). There, Commerce elaborates on its reason for rejecting the importers' argument that it had "agreed to ascertain statutory FMV precisely as it had in the past * * * in calculating home market advertising, sales promotion, and warranty expenses." 52 Fed. Reg. 8942. Commerce states:

> [T]he phrase "traditional methodology" is limited to the calculation of foreign market values based upon information and data supplied by Japanese respondents. It precludes future use of the "commodity tax" method in calculating FMV.

Id. at 8943.

The pertinent part of the Settlement Agreement states:

> 6. With respect to the appraisement and liquidation of entries of television receivers from Japan subsequent to March 31, 1979 under T.D. 71-76, the parties agree:
>
> * * * * * * *
>
> (h) That the United States shall utilize the traditional methodology in calculating foreign market values, purchase prices and exporter's sales prices based upon information and data supplied by the Company and the Japanese manufacturers(s)/exporter(s) from which it has purchased or will purchase unless the United States justifiably concludes that the data submitted by the Company and the Japanese manufacturer(s)/exporter(s) from which it has purchased or will purchase is untimely, materially inaccurate or incomplete. For the purposes of this subparagraph, "traditional methodology" includes the method under which entries under T.D. 71-76 were assessed and liquidated prior to March 31, 1978, as altered by any changes in that method reflective of applicable amendments to the Antidumping Act, or the regulations and practices thereunder;
>
> * * * * * * *
>
> (j) That the United States shall promptly revoke or modify T.D. 71-76 as soon as circumstances warrant such revocation or modification in accordance with procedures set forth in the applicable regulations of the Commerce Department.
>
> * * * * * * *
>
> 11. This agreement represents the entire understanding and agreement between the Company, its subsidiaries, affiliates, par-

[19] The United States' authority to enter into such agreements was upheld by the Court in *Committee to Preserve Am. Color Television v. United States*, 2 C.I.T. 208, 218, 527 F. Supp. 341, 350 (1981).

> ents, officers, directors, employees, representatives, agents and assigns, on the one hand, and the United States, on the other hand, in respect to the subject matter hereof, and supersedes any prior negotiation, letter or understanding relating to the subject matter hereof.[20]

(Emphasis supplied).

Fujitsu asserts that Commerce departed from its obligation to adhere to the "traditional methodology" agreed to in the Settlement Agreement with regard to calculating advertising, sales promotion, warranty expenses and other circumstance of sale adjustments.

Fujitsu asserts that ascertaining the meaning of "traditional methodology," requires consideration of, "(1) the statutes, regulations and established practices existing prior to March 31, 1978; (2) any statutory or regulatory changes which alter that methodology; [and] (3) the methodology used by Commerce immediately after the agreement was signed to lend content to the phrase "traditional methodology." Fujitsu's Memorandum in Support of Motion for Judgment Upon Agency Record at 21. In making that assertion, Fujitsu assumes that its own interpretation of "traditional methodology" is contained within the Settlement Agreement. That is not the case. We are not concerned with the process the United States must go through when it seeks to make alterations which the agreement provides for. Rather, we are concerned with the intended definition of "traditional methodology," as understood by the parties, at the time the agreement was entered into. The Court must determine whether any deviation at all would conflict with the meaning of "traditional methodology," or whether a more general meaning was intended which would not preclude some variance.

Paragraph Eleven of the Settlement Agreement states that it "represents the entire understanding and agreement" between the parties. Thus, the agreement's interpretation is limited by its own language. That being so, the meaning of "traditional methodology" is not to be found among the various parties' arguments regarding their disparate interpretations.

Fujitsu also argues that in "promulgat[ing] this new practice, Commerce has not complied with the requirements of the Administration Procedure Act. Absent such compliance, Fujitsu asserts that Commerce "is prohibited from changing its method of calculating adjustments for advertising, sales promotion and warranty expenses from that method used immediately prior to the signing of the settlement agreement." Fujitsu's Memorandum at 23-24.

Two briefs of Amici Curiae assert that Commerce is required by the Settlement Agreement to utilize the "traditional methodology" in determining circumstances of sale adjustment and FMV, exporter's sales price (ESP), and purchase price (PP). They claim that the required "traditional methodology" encompasses all aspects of the methodology used

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[20] This paragraph suggests that the meaning of "traditional methodology" should be derived from the language of the Settlement Agreement itself.

in T.D. 71-76, prior to March 31, 1978, "except as altered to reflect applicable amendments to the antidumping law, or the regulations and practices thereunder."

Amici allege that under the "traditional methodology," circumstances of sale adjustments for such items as advertising, sales promotion, and warranty and servicing expenses were made by allocating those expenses, as recorded by the company for product lines, to individual models on a *pro rata* basis. In the case of certain companies, including Matsushita, FMV was determined based on home market sales to related and unrelated distributors rather than sales from distributors to their dealers.

Amici argue that in January, 1984, Commerce compelled companies involved in reviews to identify and quantify COS adjustments for individual home market models on an "item-by-item" basis. This method required manual review of invoices, receipts, etc., in order to ascertain whether each expenditure can be attributed to a specific model. Amici claim this approach imposes a tremendous burden, is unreasonable, and "threatened to improperly alter the 'traditional methodology.'"

Amici assert that in the final results of the 2nd round review, on June 10, 1985, Commerce announced its abandonment of the allocation method of determining circumstance of sale adjustments. Future reviews would be conducted by applying the "item-by-item" approach, and other alterations in method were made which Amici assert are unwarranted deviations from the traditional methodology.[21]

After reviewing the record in this case, the arguments of the parties and the background of the settlement agreement which, among other things, gave rise to the "traditional methodology" in dispute, the Court finds that the government has not violated the agreement. The primary purpose of the traditional methodology provision in paragraph 6(h) was to insure that Commerce stopped using the commodity tax methodology which it had begun using in early 1977 and committed itself to use a methodology in which the prices of individual transactions in Japan and the United States were adjusted. This was the broad and general purpose of using the phrase "traditional methodology" and the Court has not been persuaded that the term was intended to confine Commerce to any specific techniques of adjustment. This conclusion is supported by the background, the history of the agreement, and by a proper reading of the language used in expressing the agreement.

In early 1977 there was a four to five-year backlog of unliquidated television entries which had an entered value of approximately one billion dollars. In the face of this tremendous backlog, Customs decided to

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[21] These include:

(a) application of the item-by-item approach to quantifying selling expenses on the *USP* as well as the *FMV* side of the dumping comparison; (b) disallowance of any labor warranty expenses as part of the FMV direct selling expenses adjustment; (c) imputation of theoretical "opportunity" costs to respondents, including a credit "opportunity" cost for the period that merchandise is in inventory.

Brief of *Amici Curiae* Victor Co. at 7.

use a shortcut method for deriving foreign market values for Japanese televisions and relied on a formula in the Japanese commodity tax law. In that shortened technique Customs could simply determine foreign market value by taking the suggested retail price for a particular television model and multiplying it by the appropriate percentage determined under the Japanese law. The fact that no adjustments were permitted to the foreign market value which was derived from the commodity tax formula simplified the procedure immensely. The resulting dumping margins led to total dumping duties of approximately $400,000,000. When responsibility for administering the antidumping laws was transferred to the Department of Commerce in 1980, Commerce settled the dispute, which had been going on for years, by entering into settlement agreements with the Japanese manufacturers in April of 1980.

Under the agreements, the United States waived its claims for antidumping duties for televisions imported into the United States prior to April, 1979, in exchange for cash payments from the Japanese companies totaling approximately $66,000,000. Under paragraph 6(h) of that agreement, Commerce agreed in conducting future administrative reviews, to utilize the "traditional methodology" in calculating foreign market values. Against this background it appears to the Court that the primary purpose of using the phrase "traditional methodology" was to harken back to the general approach by which foreign market value was calculated through adjustments to the prices in Japan and the United States.

When the specific language defining traditional methodology is examined it is further seen that the term is used, not as a term of strict limitation, but as a general descriptive characterization of a broad approach to the subject. First, the definition of "traditional methodology" in paragraph 6(h) states that it "includes" the methodology used in review under T.D. 71-76 before March 31, 1978. In normal interpretation of contracts and statutes, the use of the term "includes" indicates that what follows is exemplary and not restrictive. Secondly, the language of definition states that the methodologies are included "as altered by any changes reflective of applicable amendments to the antidumping act, or the regulations and practices thereunder." To the Court, this clearly indicates that the agreement contemplated a flexibility to the traditional methodology and specifically provided that it could evolve in a number of ways. Nothing in this definition indicates that the traditional methodology bound Commerce to retain or restore any specific types or techniques of individual adjustments.

In sum, the Court holds that by agreeing to use traditional methodology the Commerce Department did not bind itself to maintain specific forms and amounts of adjustments sought by the plaintiffs. It obligated itself only to abjure use of the commodity tax method and was free to develop any embodiment of traditional methodology which was consistent with administrative practice and law.

NEC argues that portions of Commerce's determination were reached by means of the application of rules which had not been formally adopted in accordance with the Administrative Procedure Act ("APA"), 5 U.S.C. § 551, et seq. Specifically, NEC contends that Commerce's determination with respect to the principal markets of Japan, to the adjustment for home market advertising sales promotion, and its determination on warranty expenses should be overturned because they applied fixed rules which had not been adopted pursuant to the APA. The APA provides that " 'rule' means the whole or a part of an agency's statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirement of an agency * * *." 5 U.S.C. § 551(4) (1982). The APA also provides that its notice and comment requirements do not apply "to interpretative rules, general statement of policy or procedure, or practice." 5 U.S.C. § 553(b)(A) (1982).

The question of what administrative conduct falls under the rubric of rule-making has been a fertile source of litigation. The basic principle used by the courts in approaching this problem, and probably the only one on which there is general agreement, is that the courts must look beyond the superficial characterization of the administrative action in order to determine whether rule-making procedures were required. *CBS, Inc. v. United States*, 316 U.S. 407, 419 (1942). The dominant characteristic of a rule, in the opinion of the court, is that it represents a fixed and invariable limitation on the discretionary authority of the administrative agency. In this court there have been two recent notable examples of administrative conduct which was found to have embodied "rules." In *Carlisle Tire & Rubber Co. v. United States*, 10 C.I.T. 301, 634 F. Supp. 419 (1986), the Count was confronted with an announced practice by the Department of Commerce that entries made on or after January 1, 1980 which were subject to aggregate net subsidy rates of less than 0.5% ad valorem would be subject to a de minimis principle and would be considered to have received a benefit which was so small that it was of no significance. The Court held that such a rule had to be promulgated in accordance with the notice and comment provisions of the APA. In *Ipsco, Inc. v. United States*, 687 F. Supp. 614 (CIT 1988), the Court faced a specific formula used by the Department of Commerce to determine how the benefits received from grants should be allocated over a period of time.

In the present case it was the Commerce Department's rejection of certain adjustments sought by NEC for advertising expenses, sales promotions, and warranty costs, and its treatment of "principal markets" which raised the issue of whether or not Commerce was engaged in rule-making. NEC argues that the results with respect to those subjects flowed from the mechanical implementation of fixed standards and were not matters involving the flexible application of general statements of policy to the specific facts of the case. NEC contends that Com-

merce applied an automatic model-specific requirement for proof of expenses in advertising and sales promotion without regard to NEC's particular facts in this proceeding. It also contends that Commerce automatically applied a fixed model-specific warranty methodology to NEC without regard to the relevant facts in this case.

Finally, NEC contends that Commerce's position on "principal markets" amounts to adopting a presumption that principal markets are all the markets in the country of exportation and is therefore the equivalent of a fixed rule to that effect.

In close examination of the subjects which NEC claims were decided on the basis of unlawfully utilized rules, the Court is not persuaded that the results were dictated by automatic, mechanical, or inflexible guidelines. The Court sees distinctions between the factors which led to the results here challenged and the factors which led to those results in other cases which was found to be the outcome of fixed rules. In the result reviewed in *Carlisle*, the principal that benefits which resulted in aggregate net subsidy rates of less than 0.5% *ad valorem* were not countervailable, was not open to alteration. It was a fixed mechanical and mathematical rule. In the conduct examined in *Ipsco*, the Court found "a hard and fast rule regarding the period of time over which to allocate benefits received from grants." 687 F. Supp. at 627. Here, however, the results do not appear to have been preordained or made automatic by the practices involved.

With respect to the question of "principal market" the record supports the conclusion that Commerce was open to the possibility that principal markets could be less than all markets in Japan. The result it reached was not due to an inalterable rule that principal markets would always be all markets in Japan but rather, a finding that NEC had failed to furnish evidence to support its assertion that principal markets should be less expansive. *See* 53 Fed. Reg. 4053 (Comment 33). This was not a result which came about because of an inflexible rule concerning the definition of markets. Rather, it is a result reached by following the broad principle that those respondents who want to receive a claimed adjustment must provide the agency with substantial evidence in support of that adjustment.

With respect to Commerce's calculation of NEC's warranty expenses on a model-specific basis, the Court does not find that this was the result of an inflexible policy of always calculating warranty expenses on a model-specific basis. The Court finds that this was a practice which related to the manner in which companies' records were kept. In the case of companies which do not keep their warranty records on a model-specific basis, Commerce apparently does not calculate the adjustment in that manner. See *Study of Antidumping Adjustments Methodology and Recommendations For Statutory Change* (Nov. 1985), at p. 48. In the context of this case the use of model-specific allocation for NEC appears to have been the agency's allowable adjustment of its adjudicatory and investigative functions to the form in which the information was main-

tained by NEC. It does not appear to have been a hard and fast rule that nothing except model-specific information would be acceptable.

Finally, the subject of home market advertising sales promotion expenses was not resolved by virtue of a fixed rule. While it does appear that Commerce was moving towards the rigid use of model-specific allocation over the last few years, the most important development is that it now believes that model-specific allocation in that area leads to inaccurate and erratic results in many instances and has requested the Court to remand the proceeding so that advertising and sales promotion expenses can be allocated on a product line basis. As a practical matter, this removes the subject of advertising expenses from the dispute about rule-making and would make any opinion by the Court on that subject pointless. Therefore, this matter shall be remanded to Commerce.

For the reasons given above, the Court finds that the notice and hearing requirements of the APA should not apply to the determinations made by Commerce with respect to NEC's advertising expenses or warranty expenses, or to the subject of the "principal markets" of Japan.

Fujitsu and NEC have claimed that in calculating FMV, Commerce wrongfully considered all markets in Japan rather than the assertedly more limited "principal markets" used in the statutory definition of FMV. NEC objects to Commerce's use of sales to distributors outside the Tokyo and Osaka areas, and Fujitsu objects to the inclusion of sales to farmers' cooperatives.

The term "principal markets" is not defined in the antidumping law. It has become clear that the meaning of terms used in customs law, either for classification or valuation purposes, cannot be automatically transferred to the field of antidumping law. *Cf. Zenith Radio Corp. v. United States*, 9 C.I.T. 110, 606 F. Supp. 695, 700-01(1985), *aff'd*, 783 F.2d 184 (Fed. Cir. 1986). This means that determining FMV Commerce is not restricted to those places in which the majority of home market sales occur. Nor is there any basis in the law to confine Commerce to those markets which are in the most populous sections of the country. In short, it was perfectly reasonable for Commerce to view "principle markets" as those markets throughout the country in which the product was usually sold, and to leave open for exclusion from principal markets only those places in which sales was not normally made. Using this standard, Commerce was correct in concluding that there had been no showing that the principal markets were less than the usual markets throughout Japan. The mere fact that sales to farmers cooperatives were made in rural areas does not provide a logical basis for the Court to distinguish them, particularly in view of the fact that the record shows a significant amount of such sales. The conclusion that Commerce's concept of principal markets was in accordance with the law also disposes of any arguments that the prices it found in those markets had to be further adjusted to account for differences between the markets used and the statutory norm.

Fujitsu claims that Commerce should have imputed a financing cost to the televisions sold in the home market for the entire period they were held in inventory, i.e., from the date of production to the date of sale, and argues that the failure to do so was inconsistent with the fact that Commerce imputed such inventory costs on the U.S. side and deducted them from the U.S. price. In its determination, Commerce concluded that no adjustment was warranted because Fujitsu had not provided the necessary data. Fujitsu also argues that if that was so, Commerce should have sought additional information on that subject.

The adjustment sought by Fujitsu is not one required by 19 U.S.C. § 1677b because home market pre-sale expenses would appear to be general overhead expenses for which no adjustment is permitted. This Court has previously affirmed Commerce's practice of removing from ESP the imputed cost of financing exported merchandise from the date of exportation to the date of resale in the United States, and has not found such practice inconsistent with the refusal to remove imported costs of financing home market merchandise prior to its sale. *Silver Reed Am., Inc. v. United States*, 683 F. Supp. 1393 (CIT 1988).

The adjustment which Fujitsu seeks arises under the Commerce regulation which, *inter alia*, permits a limited adjustment of FMV when a comparison is made using ESP. As such, it is an adjustment which must be established by the party seeking it. Fujitsu did not provide the data needed to calculate the appropriate imputed financing costs.

Fujitsu also argues that Commerce should adjust FMV for indirect selling expenses attributable to Fujitsu's Direct Marketing Group. Commerce rejected that adjustment because the claim was made for the first time in Fujitsu's pre-hearing brief, too late to be considered or verified. In the opinion of the Court that rejection was fully justified. When a party does not submit information during the period specified by Commerce it is well within the authority of the Department to reject such a submission. *Ansaldo Componenti, S.p.A. v. United States*, 10 C.I.T. 28, 36, 628 F. Supp. 198, 204-05 (1986); *UST, Inc. v. United States*, 9 C.I.T. 352, 357 (1985).

NEC argues that the adjustments to FMV for advertising and sales promotion expenses should have been allocated on a product-line, rather than a model specific basis. Commerce indicates agreement with this argument by concluding that model-specific allocations have led to inaccurate and erratic results in many instances because most companies do not keep advertising records on a model-specific basis; such allocation is susceptible to manipulation designed to reduce dumping margins; and such allocation is burdensome. Commerce requests that the Court order a remand of the proceedings so that all advertising and sales promotion expenses can be allocated on a product-line basis. For this reason, and because courts have held the allocation of such expenses on a product-line basis to be correct, a remand for this purpose is ordered. *See Smith-Corona v. United States*, 713 F.2d 1568, 1581 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

NEC disputes Commerce's circumstance of sale adjustment for warranty expenses on a number of grounds. Those arguments which claim that the treatment of warranty expenses violated the 1980 Settlement Agreement and the Administrative Procedure Act are rejected on the basis that the agreement did not limit Commerce's authority to modify its practices, and that the Administrative Procedure Act does not apply to the means used to reach these results. *See* H.R. 317,96th Cong., 1st Sess. § 181 (1979).

The allocation of warranty expenses on a model-specific basis was legally correct because it was reasonably calculated to arrive at a sound estimate of the costs involved. The mere fact that actual warranty expenses will not be incurred until after the review period does not make it unreasonable to use the per-unit outlay for actual repairs on particular models during a prior period. *See Smith-Corona Group v. United States*, 713 F.2d at 1581. With regard to the labor costs, Commerce disallowed amounts paid by NEC to a related service company. It was eminently reasonable for Commerce to treat them as suspect. In the absence of satisfactory evidence that they would have been the same if paid to an unrelated company, Commerce properly disallowed them.

It should be noted here that Commerce also disallowed warranty labor expenses incurred in the home market by Mitsubishi, which also used a related service company. Mitsubishi attempted to show that the costs were reasonable because the related company made a profit, but that does not show conclusively that it made a profit on the services which it performed for Mitsubishi. Given that circumstance of sale adjustments such as this warranty labor adjustment must be "established to the satisfaction of the administering authority" under 19 U.S.C. § 1677b(a)(4)(B), and that it was reasonable for Commerce to require a stronger basis for concluding that services were priced at arm's length, the disallowance of the labor expenses was reasonable.

NEC argues that Commerce erred in refusing to make a level of trade adjustment to account for the fact that Commerce was comparing NEC's ex-factory level of trade with home market sales made at the wholesale level of trade. According to NEC, Commerce was obliged to reduce the FMV of purchase price sales in the U.S. by the value attributed to the distribution services of NEC sales companies in Japan. With respect to this claim Commerce stated:

> We do not adjust foreign market value to account for sales companies' profits. Furthermore, NEC did not demonstrate that the claimed selling expenses were related solely to the sales of comparison models. We do, however, consider these expenses indirectly-related selling expenses. Therefore, we included them in the ESP offset and allocated them to the total sales value of all televisions sold in the home market during the period.

53 Fed. Reg. at 4053 (Response to comment 35).

The Court finds that Commerce's insistence that NEC relate the claimed expenses to specific comparison models was lawful and reason-

able. Consequently, the refusal to make the adjustment was proper. Moreover, use of home market distribution costs to adjust a US price resembles the technique which Commerce previously rejected, as upheld by this Court in *Fundicao Tupy S.A. v. United States*, 678 F. Supp. 898 (CIT), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988).

Commerce also refused to deduct home market inland freight from NEC's home market value. NEC claims this violates Commerce's obligation under 19 U.S.C. § 1677e(a) to use the best information otherwise available. NEC argues that in the circumstances prevailing in this case, Commerce should have considered whether the inland freight expenses incurred for exports to the United States was the best information available. The Court finds NEC's argument to be meritorious.

The government argues that the adjustment for differences in freight charges for sales in the two markets involved is a circumstance of sale adjustment which, under 19 U.S.C. § 1677b(a)(4), must be established to the satisfaction of Commerce. According to the government, this empowers Commerce to insist on verification and to refuse to exercise the discretion it has if it decides to rely on its authority to use the best evidence available under 19 U.S.C. § 1677e(a). In other words, the government asserts that if a claimed circumstance of sale adjustment cannot be verified, Commerce may refuse to grant it. The government contends that this view of the law is in harmony with the principle that a more specific legislative enactment or grant of authority controls a more general one. *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

The Court finds that Commerce's position would nullify the provision for using the best information available. All provisions of the law which require specific information for a particular adjustment or calculation will be more specific than the general provision for utilizing the best information available. Consequently, this statutory structure does not represent a conflict between specific and general provisions, but rather a situation in which related provisions must be harmonized. *See Weinberger v. Hynson Westcott & Dunning*, 412 U.S. 609, 630-31 (1973). With that objective in mind, it is unreasonable to ignore the indirect evidence of inland freight unless there was good ground for believing that it was inaccurate or unreliable. *Atcor, Inc. v. United States*, 11 C.I.T. 148, 159, 658 F. Supp. 295, 303 04 (1987). Commerce should have examined the other evidence offered on this question, and the matter is remanded for that purpose.

Commerce's treatment of home market inland freight is also disputed by Mitsubishi for slightly different reasons. In Mitsubisbi's case, Commerce found that the expense of inland freight from the factory to a central distribution center was incurred before the sale in the home market, and thus was not a direct selling expense. Mitsubishi argues that Commerce's conclusion as to the sequence of events is not supported by evidence in the record, and that even if the shipments preceded the sales the shipping expenses should be allowed.

The Court has found no evidence in the record to confine the government's argument that Mitsubishi has indicated that the sales were made after production, and that the televisions in question spent most of the intervening period at the distribution center. In fact, Mitsubishi's letter of March 25, 1987, with respect to storage times (R at reel 2, frames 2524-25) indicates that the VSS units involved were stored at the factory for nearly three times as long as at the distribution center. The 37-inch TV's spent less time at the factory because they were sold more quickly, but they spent no more time at the distribution center than the VSS units. This contradicts Commerce's conclusion that sales were made well after production, and the Court finds that Mitsubishi's claim for an inland freight adjustment as a direct expense should have been granted. That matter is remanded to Commerce for correction.

NEC, Fujitsu and Mitsubishi contend that Commerce erred in calculating the cash deposit rate for estimated dumping duties, and Commerce now agrees. The parties' request that the Court remand the matter to Commerce so that it may make a difference in circumstance of sale adjustment for purposes of calculating the weighted-average percentage cash deposit rate. The Court has, in this case, reaffirmed its position that it is improper to use circumstance of sale adjustments merely to achieve complete tax neutrality. The Court has held that the antidumping law does not support the proposition that a tax differential generated by actual dumping constitutes an adjustable difference in circumstance of sale under 19 U.S.C. § 1677b(a)(4)(B). Accordingly, Zenith's position on this issue is correct, and the Court will not allow an adjustment to the deposit rate.

Mitsubishi claims that Commerce erred in making the upward adjustment to US price required by law for the amount of the commodity tax which would have theoretically been assessed against the exported merchandise if the Japanese commodity tax law had been applied to the export sale. Commerce admits that it took the expedient route of calculating the tax amount in question by taking the price between Mitsubishi Electric Corporation (MELCO) and the related Mitsubishi Electric Sales America (MESA), removing transportation costs and packing, and multiplying that adjusted figure by the 20% commodity tax rate in effect during the period of review. It chose not to accept Mitsubishi's demonstration that under the Japanese commodity tax law, the calculation of the tax on U.S. sales would have been based on sales from MESA to its customers, and not on sales between related companies.

Commerce acknowledges that the law requires it to add the putative amount of commodity tax to the U.S. price but offers two rationales for not doing so in exact conformity with the Japanese commodity tax law. Commerce states that it lacks sufficient expertise in the Japanese commodity tax law to determine that Mitsubishi's analysis of the method for calculating the tax is correct and, in any event, that its circumstance of sale adjustment eliminated the "distortion" of the margin attributable to the commodity tax. Inasmuch as the use of circumstance of sale ad-

justments to remove perceived distortions in the margins as a resulting from commodity tax has been found to be unlawful by this Court, Commerce is left with the claim that it lacks sufficient expertise to accomplish this determination. Zenith argues that Commerce has more discretion in this decision than it claims, and that it could take the related party price to be an arm's-length transaction, suitable for use under Japanese law in the absence of evidence to the contrary. This leads to Zenith's rather interesting attempt to demonstrate that the record supports the view that sales between MELCO and MESA were at arm's length.

The Court is of the opinion that neither lack of expertise nor wide-ranging discretion would justify Commerce ignoring a thorough demonstration on the record of how the Japanese commodity tax would have applied in this case. The administrative record contains abundant material showing how and why the commodity tax would have been applied to the merchandise in the manner advocated by Mitsubishi. As far as the Court can see, the presentation would have been sufficient to allow Commerce to make an evaluation of the evidence without any extraordinary effort. The Court has been sufficiently informed by the material in the record to reach a decision on this point, to conclude that Mitsubishi's assertions as to the application of the commodity tax law are correct, and to issue implementing instructions for Commerce to follow on remand.

The Japanese commodity tax is a consumption tax imposed on manufacturers for administrative convenience on seventeen classes of commodities. There is an assumption that it is passed on to the customers in the form of higher prices. Televisions are Class 2 commodities, on which the tax was 20% during the period of review. Under the Commodity Tax Law there are alternative methods of determining the tax basis to which the tax rate is applied. For televisions, the normal tax basis under Article 11.1(2) of the Commodity Tax Law would be an amount equivalent to the freely offered selling price of the commodity in the place of manufacture.

The Cabinet Order for the Enforcement of the Commodity Tax Law (the "Cabinet Order"), in its Article 9, treats related sales entities as "special selling organizations" or "agency", and provides seven alternative methods of calculating the commodity tax for transactions in which they are involved. Of the alternatives, the first two look for sales of identical or very similar merchandise to a non-special selling organization customer in the preceding month. No such sales took place here. The third alternative is essentially a constructed value approach which builds up the price of a special selling organization to a theoretical unrelated customer from cost of manufacture, selling expenses of the manufacturer, ordinary profit of the manufacturer and selling expenses of the special selling organization and any further special selling organization which might be located in the chain of sale. This method could be used by Commerce but obviously involves a tremendous investigative effort. The Cabinet Order expressly recognizes that this method is difficult and

provides an alternative in Article 9.2. Moreover, the level of regulations closest to the taxpayer, known as the Basic Notification Concerning Enforcement of the Commodity Tax Law ("Basic Notification"),[22] make the use of the constructed value method optional with the taxpayer. Mitsubishi has expressed its belief that the constructed value method is infeasible and inappropriate. The Court agrees, and holds that it should not be used.

The tax basis is determined by Article 9.2 of the Cabinet Order, and the first of the four alternatives is clearly the appropriate method to be applied in this case. In essence, Article 9.2 provides that in the case of an special selling organization removed from the constructed value method and dealing in a commodity normally covered by the aforementioned Article 11.1(2) of the Commodity Tax Law, the tax basis shall be the amount of the special selling organization's price to its customer less an amount representing its profit on that sale. That amount for profit would be 5% under Article 2.2 of the Ordinances issued in 1962 by the Ministry of Finance.

As a result of the above sequence, the Court finds that the Commodity Tax Law tax basis would be 95% of MESA's gross price to the dealer and the commodity tax adjustment should therefore be 20% (0.95 x unit price) or 19% unit price. The provision in Article 9.2 for price to be based on the preceding month may be safely ignored here, because a definite corpus of completed transactions on which to calculate the tax exists. The Court holds that the tax should be applied directly to those transactions. This issue shall be remanded to Commerce for implementation in accordance with the Court's decision.

Mitsubishi argues that Commerce erred in the calculation of its home market advertising expense. In the case of Mitsubishi, Commerce's normal practice of dividing the total advertising expenses for the product during the review period by the total sales of the product during that period would have given Mitsubishi nothing. The unbalanced result would have occurred because Mitsubishi concentrated its large advertising campaign for one model in March of 1986, just after the end of the review period. To reach a fair result Commerce departed from its normal method, but not in the direction desired by Mitsubishi. Commerce looked back to Mitsubishi's advertising experience from the previous period and used that as the best information available. Mitsubishi contends that Commerce should have used the data from the final year in which Mitsubishi incurred the advertising expenses, which would have given them the benefit of the expenses incurred in March of 1986. Although Mitsubishi's argument may be in conformity with good business and accounting practice and may be closer to commercial reality, it fails due to the basic principle that substantial evidence need not be the best evidence. The real question is whether the information which Com-

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[22] This is issued by a subagency of the Ministry of Finance known as the National Tax Administration Agency, which is analogous to our Internal Revenue Service.

merce used was so distorted, remote or inaccurate that its use was unreasonable. The authority to use the "best information available" does not require the agency to use more than the information reasonably calculated to provide substantial evidence for a determination. *Atlantic Sugar Ltd. v. United States*, 744 F.2d 1556, 1560 (Fed. Cir. 1984). The Court concludes that, although Commerce's use of prior advertising expenses may not have been as exact as the information presented by Mitsubishi, it was proper and lawful.

For the reasons given above, it is hereby ORDERED that plaintiffs' motions for judgment on the record are granted to the extent indicated in the opinion, and the case is remanded to the Department of Commerce for the issuance of a new determination consistent with the Court's opinion herein, and it is further ORDERED that Commerce shall issue said determination and transmit it to the Clerk of the Court within 60 days from the date of entry of this decision.

(Slip Op. 90-133)

POLLAK IMPORT-EXPORT CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 89-02-00088

OPINION

Plaintiff importer entered and redelivered certain garments pursuant to a Demand for Redelivery; and in return for remission of forfeiture paid a penalty of $2,000.00; Customs mitigated damages for certain other garments which were not redelivered by importer from $110,340.00 to $860.00. Importer demands return of both sums and the expunging of the record.

Held: Administrative settlements and a related hold harmless agreement are dispositive and no protestable event remains available upon which the jurisdiction of the Court can properly be invoked. Defendant's motion to dismiss for lack of jurisdiction is granted.

[Dismissed.]

(Decided December 20, 1990)

Fitch King & Caffentzis (*James Caffentzis*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Susan Burnett Mansfield*) for defendant.

Plaintiff Pollak Import-Export Corporation (Pollak) imported wool garments under item 384.63 TSUS on August 5, 1987, along with a visa under category 446 (sweaters). These garments required a visa: the visa accompanying the merchandise did not match the number on the invoice for the merchandise.

The United States Customs Service (Customs) issued a notice of redelivery for all of the merchandise on August 19, 1987, which stated

that "subject merchandise is classified as coats not as sweaters. A visa for category 435 is required." Pollak protested against redelivery of the entire batch of garments on November 16, 1987, but redelivered 602 garments to Customs at the same time.

Customs seized the 602 garments on December 9, 1987, pursuant to 19 U.S.C. sec. 1595a(c) and Pollak petitioned to rescind the seizure and to reexport the 602 garments on January 7, 1988. Customs remitted forfeiture on February 12, 1988, while Pollak assented to a Hold Harmless Agreement and agreed to reexport the merchandise and pay a $2000.00 fine. Pollak reexported the 602 garments on May 6, 1988.

The Hold Harmless and Release Agreement (Agreement) reads in relative part" * * * Pollak Import-Export, hereby release[s] and forever discharge[s] the United States * * * from any and all actions, cause of actions, suits, proceedings, debts [etc.] whatsoever * * * in connection with the detention, seizure, and/or release by the United States Customs Service [of the 602 garments]. * * *"

On May 12, 1988, Customs demanded $110,340.00 in liquidated damages for Pollak's failure to redeliver the balance of the merchandise. Pollak immediately petitioned for relief from the liquidated damages, before Customs had decided Pollak's original protest against redelivery. Pollak agreed to pay when Customs mitigated the liquidated damages for failure to redeliver from $110,340.00 to $860.00 on March 9, 1989.

On August 25, 1988, Customs denied Pollak's original protest against redelivery. Customs liquidated the original entry in its entirety with no change in the original duty rate under 19 U.S.C. sec. 1500 on July 28, 1989. Customs later reliquidated the entry to take into account the 602 garments that Pollak reexported on July 6, 1990.

On February 28, 1990, Pollak filed its complaint, seeking repayment of both the sums of $2,000.00 and $860.00 and removal of both penalties from the record.

Defendant moves to dismiss plaintiff's complaint for $2,860.00 in damages on the grounds that the controversy was mooted by plaintiff's settlement of two controversies over liquidation and/or redelivery of goods.

Discussion

The Court has no jurisdiction over the exported garments because the Agreement effectively disposes of all claims Pollak may have had, and thus presents to the Court no claims for which relief can be accorded. Also, under the doctrine expounded in *Wear Me Apparel Co. v. United States*, 10 CIT 332, 636 F. Supp. 481 (1986), the merchandise was no longer "excluded" merchandise once it was exported, and there remains no protestable event.

Pollak signed the Hold Harmless and Release Agreement as a part of the settlement of the protest over seizure and reexport of the 602 garments. Pollak contends that the Agreement has no bearing on the administrative protest it made concerning the demand for redelivery of the original batch of goods. However, the Agreement lists the entry

number of the entire batch, and it releases the U.S. for any action concerning "the above listed property." Although the Agreement lists the entry number of the entire batch of 241 dozen garments, it describes the "24 cartons of redelivered ladies wool knitted jackets." It is unclear whether the original "241 dozen" entry corresponds to the 24 cartons described in the Agreement.

Pollak redelivered only the 602 garments. Therefore, the Hold Harmless Agreement pertains only to the seizure of the redelivered goods and not to the protest of the demand for redelivery of the original entire batch of 241 dozen garments.

Customs' actions regarding the original protest and the Hold Harmless Agreement accord with this interpretation. Customs liquidated the original batch only after the Hold Harmless Agreement was signed and Pollak's fine of $2000.00 paid. The original protest was outstanding, and was decided after the Agreement was signed.

In light of the Hold Harmless Agreement, Pollak's claim is moot as to the 602 garments.

With respect to the imported merchandise which was not redelivered, Customs' mitigation of damages from $110,340.00 to $860.00 while perhaps not technically an accord and satisfaction is nevertheless a complete administrative resolution of the controversy leaving no protestable event which would vest jurisdiction in this Court. *See ITI Semi-Conductors v. United States*, 6 CIT 231, 236-37, 576 F. Supp. 641 (1983) (Customs' threat to refer case to prosecuting authorities for nonpayment was not coercion but rather threat to pursue legal remedy). The claim concerning the protest made against redelivery of the original batch of garments was mooted by Pollak's payment of the $860.00 in liquidated damages.

Pollak's demand that the record be expunged is a new claim not pursued in the administrative proceedings and cannot be raised at this level.

Under all of the circumstances the Court finds that it has no jurisdiction over Pollak's claim and the government's motion for dismissal must be, and is hereby granted.

(Slip Op. 90-134)

NATIONAL BONDED WAREHOUSE ASSOCIATION, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, ET AL., DEFENDANTS

Court No. 87-02-00270

[Settlement approved. Plaintiff's motion for attorneys' fees granted in the amount of $613,888. Expenses awarded in the amount of $8,513.53.]

(Decided December 21, 1990)

Sandler, Travis & Rosenberg, P.A. (*Ronald W. Gerdes* and *Gilbert Lee Sandler*) for plaintiff National Bonded Warehouse Association, Inc.

Wallace Engels, Pertnoy, Solowsky & Allen, P.A. (*Sidney M. Pertnoy*) for plaintiff International Bonded Warehouse Corporation.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch (*John J. Mahon*), for defendants.

Opinion

Background

Restani, *Judge*: The court has been requested to approve settlement of $2.1 million in this classification. In addition, plaintiff's counsel, Sandler, Travis & Rosenberg, P.A. ("ST&R"), seeks to recover reasonable attorneys' fees and expenses from the resulting "common fund." This motion is opposed by International Bonded Warehouse Corporation ("IBWC"), which has filed an opposition to the application for attorneys' fees and expenses.

This case was brought by the National Bonded Warehouse and Cargo Association (formerly the National Bonded Warehouse Association) and others, challenging increases in the annual fees by Customs Services for the years 1985 through 1987. ST&R serves as legal counsel for the plaintiff association and brought the case as a class action with no formal guarantee of remuneration. Although it normally does not act on a contingency fee basis, in a related case, *White Rose Distributing Co., et al. v. United States Customs Service*, Court No. 7-02-00268, ST&R represented a limited number of individual clients based upon a contingency fee arrangement providing that, if successful, the firm would be entitled to forty percent of the amount recovered. The contingency fee arrangement accepted by plaintiff association, which represents many members of the certified class, was one-third.

Plaintiff's counsel observes that the case at bar was one of first impression in this court. Never before had fees charged to warehouses been the subject of litigation. As a result, the statutory authority and the procedures to follow in such a case were not well defined. Furthermore, no classification suit had ever been brought in this court. Despite such legal obstacles, ST&R negotiated a settlement in the amount of $2.1 million.

Discussion

I. Approval for the Class Action Settlement

Unlike the settlement of most private civil actions, class actions may be settled only with the approval of the court. This procedural safeguard is necessary to protect the named plaintiffs, whose rights may not have been given due regard by the negotiating parties. *Collins v. Thompson*, 679 F.2d 168, 172 (9th Cir. 1982); *Simer v. Rios*, 661 F.2d 655, 664 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982). The standard by which a proposed settlement is to be evaluated is whether the settlement is fundamentally fair, adequate and reasonable. *Officers For Justice, et al. v.*

Civil Service Comm'n of the City and County of San Francisco, et al., 688 F.2d 615, 625 (9th Cir. 1982) (citing cases), *cert. denied, sub nom. Byrd v. Civil Service Comm'n*, 459 U.S. 1217 (1983). The court's determination will necessarily involve a balancing of several factors which may include, *inter alia*, the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed, and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. *Id.* Ultimately the court's determination is nothing more than a delicate balancing of these factors, keeping in mind that voluntary settlement is the preferred Deans of dispute resolution.

In this case, the court considers the settlement fair and equitable for the following reasons. There was no opposition to the settlement, except that IBWC, the party opposing the claim for attorneys' fees, requested appointment to study the settlement. The court denied the request. IBWC's latest filings indicate that the settlement was "desirable" and "achieved in relatively short period of time." Memorandum of Law in Opposition to Application for Attorneys' Fees and Costs at 2. Thus, there is no true opposition to the settlement.

As the case involved a difficult jurisdictional issue which was originally resolved against plaintiffs, the court must conclude that success on this issue at the appellate level is not certainty and thus, there is a possibility of a recovery of zero.[1] The upper limit of recovery in the class action is in the neighborhood of three million dollars, exclusive of interest. As all issues both as to the merits and jurisdiction are of first impression, a precise analysis of where settlement should fall is not a matter which may best be resolved by outside experts. In this case, because of the involvement of government counsel and private counsel experienced in practice before the court, the court has considerable trust ln the normal process, whereby negotiation and assessment of litigation risks has led to an outcome acceptable to all parties.

The court also believes that litigation of the technical issue of structure of fees based on factors set forth in 19 U.S.C. § 1555 would be time-consuming and expensive and there is no guarantee continued litigation would yield full recovery by plaintiffs.

In sum, there has been complete notice and opportunity to be heard and no substantial reason for not settling for the $2.1 million figure has emerged. Counsel for plaintiffs have the expertise necessary to assess the merits of the settlement and exercised appropriate judgment in attempting to resolve this matter promptly at a pre-trial stage. The governmental defendant has fully reviewed and approved the settlement.

[1] If the court's jurisdictional rulings are in error, only those few parties which filed individual yearly protests could recover any amounts. There was little incentive to pursue any fee overcharging on an individual basis. The amounts to be recovered were likely not worth the effort of individual protests and suits. Only this class action provided the vehicle for wide-spread refund of fees.

The court believes a recovery of two-thirds of the principal amount in litigation is a fair settlement for both sides in this case and notes that such a settlement reflects the very real litigation risks to all concerned.

II. Attorneys' Fees

Generally attorneys' fees are calculated using the "lodestar" approach established in *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973) and *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3rd Cir. 1976). The first step in this process is to determine the "lodestar" amount. This is the number of hours reasonably expended on a case multiplied by n reasonable hourly rate of compensation for each attorney involved. The second step is to adjust the lodestar amount either up or down based on a variety of factors, including the contingent nature of the case and the quality of the work performed. *See County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1477, 1479 (E.D.N.Y. 1989) (citing precedent for the "lodestar" method).

A. *The Baseline Lodestar Amount:*

In this case, review of the record indicates that ST&R spent 2,054.30 hours working on this matter.[2] At the hourly rates which were in effect at the time the services were rendered, the total attorneys' fees amount to $306,944.

The court finds that ST&R's representation of the amount of time required to prepare for this case was not excessive. IBWC's argument that ST&R inefficiently billed partners' time must be discounted. As ST&R notes, Mr. Gerdes was the only attorney in the firm's Washington office at the time the work was performed and as a result it was not always possible for him to delegate legal matters to a subordinate with a lower billing rate. Furthermore, the court sees nothing peculiar in permitting a partner to engage in research and bill the time accordingly. *See Muehler v. Land O'Lakes, Inc.*, 617 F. Supp. 1370, 1379 (D. Minn. 1985). One would assume an experienced partner's research would be more efficient and productive. Likewise, it is to be expected that a partner will review an associate's work product and conduct inter-office conferences concerning the status of the case.

The court is also not inclined to dissect the amounts attributed to paralegal services. The fees charged and the time spent by ST&R for the basic administrative chores do not seem to be excessive or wasteful.

The time spent in defending the motion to disqualify plaintiffs' counsel is allowed. The court previously ruled that disqualification of the firm would severely disadvantage the class. Indeed, after plaintiffs' counsel prevailed on the motion, earnest settlement negotiations ensued.

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[2] Originally ST&R claimed that they expended 2,058 hours, offering the entries in their Billing Memorandum as proof of these hours. Upon learning that two of the entries were duplicative, ST&R modified the number of hours spent by subtracting 3.7 hours from the total.

Hours for work prior to filing of the complaint are allowed because they are directly related to case preparation. No award is made for "lobbying efforts" which resulted in a favorable amendment of the statute for future years.

The hourly rates charged by ST&R are also reasonable. Basically, the requested rates must be in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. *See Blum v. Stenson*, 465 U.S. 886, 895-96 n. 11 (1983). In this case the appropriate "legal community" is composed of customs law practitioners throughout the United States. ST&R has provided affidavit which sets forth the hourly rates in effect for other: customs law firms. When viewed in this light, the rates charged and claimed by ST&R fall well within the acceptable range of rates prevailing on the appropriate legal community. The rates are also comparable to the hourly fees charged by members of the bar located in the same geographical area as plaintiffs' counsel.

Rates are allowed as of the time the services were performed. Services were rendered within the last few years. In this period of single-digit inflation and interest rates, the court sees no need to elevate the rates to current levels. Use of rates applicable to the time when services were rendered is more precise.

In conclusion, the court determines that the lodestar amount in this case is $306,944.

B. *Discretionary Adjustment of the Lodestar Amount:*

ST&R urges the court to enhance the lodestar amount and award attorneys' fees in the amount of $700,000. Although the court agrees that application of a multiplier is justified due to the contingent nature of the case and the excellent quality of representation, a multiplier in excess of two is rejected.

Courts often permit enhancement of the lodestar amount in common fund situations for several reasons, including "the risk of litigation, the complexity of the issues, and the skill of the attorneys." *In re "Agent Orange" Product "Liability Litigation*, 611 F. Supp. 1296, 1310 (E.D.N.Y. 1985) (*quoting New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, 1140 (2d Cir. 1983)) *aff'd in part and rev'd in part*, 818 F.2d 226 (2d Cir.), *cert. denied. sub nom. Schwartz v. Dean*, 484 U.S. 926 (1987). Cases dealing with fee-shifting statutes that disapprove use of a multiplier are inapplicable. Although the attorneys in this case were undoubtedly skillful and the issues, as in many customs cases, complex, the court determines that the primary reason for justifying an enhancement in this case relates to the risk involved. Typically courts are willing to permit enhancement of the lodestar amount to account for the risk involved in contingency cases. *See Rothfarb v. Hambrecht, et al.*, 649 F. Supp. 183 (N.D.Calif. 1986) (multiplier of 2.0 permitted for a contingency); *In Re Cincinnati Gas & Electric Company Securities Litigation*, 643 F. Supp. 148 (S.D. Ohio 1986) (2.48 multiplier permitted for contingency, delay and early settlement).

Although this case was one of first impression, was complex, and was handled well, it is not so extraordinary as to warrant more than double the baseline lodestar amount. The court determines that a multiplier of two is sufficient in this case to compensate for risk, thus increasing the award of attorneys' fees to $613,888.[3] A limitation to simply hourly rates would chill litigation which may very well be in the interest of justice.

The court denies IBWC's request for discovery and separate evidentiary hearing on attorneys' fees. No efforts were made to pursue this matter until the settlement approval hearing. Fees were one of a number of issues that were to be the subject of the December 4, 1990 settlement hearing; preparation on the issue should have occurred prior to that time. Several months for study of this matter and for formal or informal discovery elapsed prior to the hearing. In any case, almost every factual issue raised by IBWC has been fully explained by affidavit. Further testimony from officers of the court on these matters would appear redundant.

III. Expenses

Given that this was a "common fund" class action, ST&R may be reimbursed for out-of-pocket expenses, as long as the disbursements are reasonable in amount and reasonably related to the interests of the class. *See County of Suffolk, supra* at 1480; *Cincinnati Gas, supra* at 153. The expenses enumerated by ST&R are always billed separately and, as such, are recoverable. The court determines that ST&R may be reimbursed for their expenses in the amount of $8,513.53.

The court also notes that it is to be expected that there will be costs in administering the settlement. ST&R estimates that the settlement costs will total $77,410. Plaintiffs should adjust distribution for such costs and shall seek approval for payment after any costs are incurred.

CONCLUSION

For the reasons given above, the court concludes that the settlement should be approved and that ST&R may recover attorneys' fees in the amount of $613,888 and expenses in the amount of $8,513.53 for their work in the above-noted class action. See judgment attached.

[3] The court notes that although the lodestar approach has been chosen, an attorneys' fees award of $613,888 is fair to the class under the percentage approach to determining attorneys' fees as well. An award of $613,888 is less than thirty percent of the proposed settlement, less than what many members of the class were willing to pay at the outset.

(Slip Op. 90–135)

SUGAR WORKERS UNION, LOCAL 1660, ILA, AFL–CIO, PLAINTIFFS *v.* ELIZABETH DOLE, SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR, DEFENDANTS

Court No. 88-08-00670

Plaintiffs contest determinations of Department of Labor that imports of sugar blends and substitutes did not "contribute importantly" to closure of sugar refinery at which certain of plaintiffs were employed and that various other sugar-containing products were not "like or directly competitive with" the refined sugar produced by plaintiffs' former plant, and Department's failure to investigate effects of imports of the sugar-containing products in conjunction with and as exacerbated by the system of sugar import quotas maintained by the U.S. Government.

Held: Substantial evidence supports the determinations of the Department of Labor that imports of sugar blends and substitutes did not "contribute importantly" to closure of the plaintiffs' plant, that various other sugar-containing products were not "like or directly competitive with" the refined sugar produced at the plant, and that effect of those imports in conjunction with U.S. sugar import quota is beyond the scope of injury targeted by trade adjustment assistance legislation.

OPINION

(Decided December 21, 1990)

Kelley Drye & Warren (*Eugene T. D'Ablemont, Joel E. Cohen* and *Cynthia A. Epstein*) for the plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Velta A. Melnbrencis*) for the defendant.

BACKGROUND

MUSGRAVE, *Judge:*

Plaintiffs in this action challenge the refusal of the Department of Labor ("Labor") to certify as eligible to apply for worker adjustment assistance the former employees of the Amstar Sugar Corporation's Bunker Hill sugar refining plant in Charlestown, Massachusetts. Before it was closed in 1988 the plant refined raw sugar for sale to producers of various sugar-containing products. Plaintiffs challenged Labor's prior final determination that the plaintiffs' separation from employment was not attributable to increased imports into this country of raw or refined sugar during the relevant time period. In slip opinion 89-119 of 25 August 1989, this Court remanded the matter to Labor with instructions that Labor consider the effect, if any, on plaintiffs separations of imports of sugar blends and sugar substitutes during the period; in particular the Court directed Labor's attention to a report by the General Accounting Office ("Report") alleged by plaintiffs to describe increases in imports of such items competing with the items produced by plaintiffs.

On remand, Labor determined that the Report "contained very little that could be considered in Labor's determination", Defendant's Memorandum in Opposition to Plaintiffs Motion Pursuant to Rule 56.1 ("Opposition") at 13, and that in any event the available data on imports of

sugar blends and substitutes during the relevant period provided no basis to alter Labor's prior determination of ineligibility. With respect to the former argument, Labor emphasizes that the Report estimated the level of 1987 imports of sugar-containing products "irrespective of whether domestic production was displaced", *id.*, and also that the Report "concerned allegations of illegal activities whereby sugar was imported ostensibly for use in the manufacture of sugar blended products either for export or for entry into the U.S. market.[1]" With respect to the latter, Labor states that the data on sugar blends and substitutes presented in the Report suggests that imports of such products during the relevant period were not substantial enough to have contributed importantly to plaintiffs' separation from employment as required to qualify plaintiffs for adjustment assistance.

Plaintiffs dispute Labor's remand determination on several grounds. First, plaintiffs contest Labor's finding that the Report did not address the magnitude of U.S. imports of sugar blends and substitutes. Plaintiffs assert that the Report and several of its appendices indeed contain such information in the form of statistical estimates and data on the imports of sugar-containing articles, including sugar substitutes. Plaintiffs' Memorandum of Law in Support of its Rule 56.1 Motion ("Memorandum") at 17-24. Plaintiffs also propose a somewhat different, more complex analysis of the information contained in the Report. Plaintiffs argue that it was the combination of imports of sugar-containing or sugar-substitute products along with alleged market perversions wrought by the system of quantitative restrictions on sugar imports maintained by the U.S. Government that caused or contributed importantly to the termination of operations at the Bunker Hill refinery. Plaintiffs argue that the situation of their industry is unlike the normal situation in which "the absence of substantial increases of purchases of imported like or directly competitive articles by customers of the closed plant" would disqualify its former workers from eligibility. In the sugar industry, plaintiffs claim, the increase in imports of sugar blends and substitutes, even if those imports were not for the most part purchased by the customers of plaintiffs' plant, resulted in a reduction in the overall domestic demand for raw sugar, which reduction in turn led to a decrease in the amount of sugar allowed to enter the country under the quota program; thus, less raw sugar was available, and at higher prices, for domestic refineries like Bunker Hill, and such refineries were therefore forced to reduce production. This result was compounded, plaintiffs assert, by the fact that the high support prices forced many manufacturers to switch from sugar to other sweeteners such as corn sweeteners in their products, and by the fact that the lower quota levels induced even greater imports of high-sugar-content articles (to circumvent the quota on raw sugar) which repeated the above process, further exacerbating the problem. Plaintiffs' Memorandum at 11-17.

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[1] The first consideration seems essentially irrelevant, and the second seems to *commend*, not devalue, the report as relevant to the issues in this action.

Related to this mode of analysis, plaintiffs contend that "[a]ll imports of high sugar content articles should be considered like or directly competitive articles [with those produced by plaintiffs] * * * because the increase in the importation of these articles is due solely to the substantial advantage of the imported refined sugar created by U.S. government regulation." *Id.* at 24. That is,

> the increase in sugar imported in *all* high sugar content articles, including that in mixtures of sugar and one or more other ingredients such as tea, flavoring and gelatin should be considered directly competitive products because there is substantial evidence that the sole reason for the increase in these imports was the inducement to obtain access to the substantially lower cost refined sugar in these mixtures.

Id. (emphasis added). In response to the Government's position that because of their different uses, many of these imported high sugar content items are not like or directly competitive with the refined sugar products formerly produced by the Bunker Hill refinery, plaintiffs state that in the case cited by the Government in relying on *use* as the determining factor, there was no evidence that government regulatory policy caused the domestic item to be "far more costly" than the imported item. Id.

Analysis

It is necessary in deciding between these contending positions first to examine the statute at issue establishing the eligibility criteria for worker adjustment assistance. Section 2272 of Title 19 U.S.C. numerates the requirements for "group eligibility" for worker adjustment assistance benefits, directing Labor to certify a group of workers as eligible to apply for such assistance if Labor determines

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

The dispute in this action concerns only the third requirement. Further distilled, this requirement establishes two criteria: first, the imported articles involved must be "like or directly competitive with" those produced by plaintiffs' firm, i.e., with refined sugar; second, those imports must have "contributed importantly" to the plaintiffs' separation from employment. Both elements must be established to meet the third requirement.

In a survey of the customers of the Bunker Hill refinery conducted during its original investigation, Labor "found that the increased pur-

chases of imported refined sugar were unimportant during the period reviewed." Opposition at 18. The principal issue raised by plaintiffs to be considered on remand was whether imports of sugar blends and substitutes met this requirement. In its remand investigation Labor determined that "no customers had imported sugar substitutes, although a few customers had imported blended sugar * * *." *Id*; with regard to the latter, Labor determined that "blended sugar such 'Pure Sweet,' which was purchased by some of Bunker Hill's grocery customers, is substitutable for refined sugar as a sweetener and is competitive in price with refined sugar." *Id.* at 15. However, from a further survey of Bunker Hill customers, Labor concluded that "[t]he few customers who imported blended sugar had import purchases that were not important in the relevant time period surveyed. None of Bunker Hill's manufacturing customers imported blended sugar, only the grocery customers did." *Id.* Based on these findings, Labor determined that the imports of sugar blends that did occur were not sufficient to have contributed importantly to plaintiffs' separation.

Plaintiffs apparently do not contest those empirical findings[2], and the Court discerns no reason to suspect their accuracy, nor, therefore, to conclude that part of Labor's determination based thereon is unsupported by "substantial evidence". *See* 19 U.S.C. § 2322 (b). Instead, plaintiffs state that, because of the characteristics of the sugar market noted above, "the results of customer surveys are of no significance in this matter"; Memorandum at 15; plaintiffs principally contend that Labor erred on remand in that it unduly restricted the scope of the imported products investigated and "did not consider the effect of imports of various sugar-containing substances throughout the United States on the sugar import quota and the consequences of the reduction of the sugar import quota on the ability of Amstar Sugar Corporation to provide adequate supplies of raw cane sugar to the Bunker Hill Refinery to permit it to operate." Memorandum at 3. Essentially, plaintiffs' position is that Labor did not pursue the effects of imports far enough: that after determining that those imports mentioned did not affect Bunker Hill directly by supplying customers who otherwise would have purchased from that refinery, Labor should have proceeded further to consider the effects on Bunker Hill that the imports of those and other imported sugar-containing products might have had when communicated through, magnified, or exacerbated by the U.S. government sugar import quota system, particularly in raising the price and lowering the availability of raw sugar required by Bunker Hill and in shifting demand from refined sugar to alternative products.

It is true that particular imports can "contribute importantly" to the separation of employees from a company in other ways than by directly diverting purchases by the customers that otherwise would have been placed with the company. As stated above, however, it must also be es-

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[2] Plaintiffs did not respond to the defendant's opposition memorandum.

tablished that those products are "like or directly competitive with" the merchandise produced by the separated employees. This criterion relates not so much to the effect of the imported product but to its nature, characteristics, and uses. In this regard, plaintiffs argue that all imports of articles containing high proportions of sugar must be considered like or directly competitive with the refined sugar produced by Amstar because the increased imports of all such products is "solely" due to price advantage enjoyed by imported refined sugar (i.e., the advantage that foreign manufacturers of such products enjoy by reason of their access to raw sugar that is substantially cheaper than the domestic sugar Amstar was forced to buy at prices inflated by the U.S. quota program substantially over the world price). Memorandum at 24, *et seq*. Labor rejected that argument, and the Court can not conclude that it was wrong in doing so.

The artificially inflated price of domestic sugar well may shift consumer purchasing patterns, but that fact does not establish that all articles containing sugar are like or directly competitive with refined sugar. An increase in the price of one item might shift consumer purchases to others, away from that item and even from other products in which that item is an ingredient. For instance, if a substantial increase in the price of gasoline resulted in an increased level of bicycle imports and decreased purchases of domestic automobiles, surely that consequence would not establish that bicycles are a product like or directly competitive with automobiles. That, given the change in the price of gas, a necessary "ingredient" for operating an automobile, consumers choose to change their living habits to commute more by bicycle is simply a manifestation of the basic microeconomic principle that changes in supply (from changes in cost or otherwise) cause shifts in demand patterns; this does not necessarily mean that the products to which demand shifts are directly competitive with those *from* which shifts. Such *would* be the case if, for example, an increase in the price of a certain input unique to *American* autos raised their prices relative to, and thus caused increased imports of, foreign *autos*; in that case, though, it is the fact that both the domestic and the imported items are autos that make them directly competitive, not the shift in demand alone. In the jargon of "the dismal science", the elasticity of demand for more than one product relative to the cost of a certain input does not establish those products as directly competitive with each other in essence.

In the present case, for example, several of the products identified by the Report as having been imported in increased quantities as a result of the differential in U.S. and world sugar prices are bulk sweetened chocolate bars, and edible preparations of gelatin, current strawberry and pineapple jelly, and candied cherries. Opposition at 28. The increase in those imports could very well have been caused by the fact that the foreign-source sugar included in their ingredients was less expensive than American sugar; and that increase could also decrease in various ways the domestic and foreign demand for the refined sugar produced by

Amstar. It does not, however, mean that those products are either like or directly competitive with refined sugar. Nor, as another example, are the iced tea mixes imports of which were also found by the report to have increased.

Congress chose to make adjustment assistance available not to all persons or industries displaced by "imports", nor even to just those displaced by "competitive" imports, but instead to those displaced by "*directly* competitive" imports. It is not enough, then, that the imports compete with or affect the plaintiffs' product indirectly or circuitously. Most of the imported products identified by plaintiffs and the Report are products which contain raw or refined sugar as an *ingredient*. Of previous judicial decisions on this subject in cases concerning ingredients and finished products, this Court has stated,

> Under this line of cases, the test is clear: the imported article, which allegedly injured the domestic market, "must be found to be 'interchangeable with or substitutable for' the article under investigation." *Holloway [v. Donovan]* at ____, 585 F. Supp. at 1430 (quoting *Machine Printers and Engravers Ass'n [v. Marshall]*, 595 F.2d at 862). Based on this test, a component * * * cannot be like or directly competitive with the finished product. *Bedell, supra* at 177-78.

International Union, United Auto, Aerospace and Agricultural Implement Workers of America, UAW Local 834 v. Donovan, 8 CIT 13, 20, 592 F. Supp. 673, 678 (1984); *see also United Mine Workers of America v. Brock*, 11 CIT 414, 664 F. Supp. 543 (1987). Plaintiffs object that the cases relied upon by Labor on this point did not involve government programs which caused the increases in imports. The Court discerns nothing in the statute or otherwise that makes that distinction material to the present controversy.

What *is* like and directly competitive with plaintiffs' product is imported refined sugar, and possibly *some* sugar substitutes or blends. But Labor's investigation showed that the increase in imports of refined sugar in the relevant period was minimal, as was the level of imports of blended sugar by customers of the Bunker Hill plant; and that no customers surveyed reported increased purchases of sugar substitutes. As stated earlier, the Court is aware of nothing to cast doubt on these findings. Also, for the reasons given, the Court deems sound Labor's determination that other items than these involved in the Report can not be found to be like or directly competitive with refined sugar. Therefore, the Court finds no basis to displace the presumption of correctness resting with Labor's determination.

This is not to deny the possibility of perverse and substantially harmful consequences of the U.S. system of sugar import quotas, for plaintiffs and for other domestic companies as well. The present action, however, was brought under the trade adjustment assistance legislation and must be decided in accordance with the requirements established therein; for any consequences of the quota system not falling within

those strictures, harmful though those consequences may be, redress must be sought from the architects of that system - Congress.

Conclusion

For the foregoing reasons, the Court concludes that the determinations by the Department of Labor on remand are supported by substantial evidence on the record. Accordingly, plaintiffs' motion is denied and this action is dismissed.

(Slip Op. 90-136)

Admiral Division of Magic Chef, Inc., plaintiff *v.* United States, defendant

Court No. 86-10-01342

Plaintiff challenges Custom's classification of imported defrost control timers as time switches under TSUS item 715.62, claiming that they are properly classifiable as parts of refrigerators and refrigerating equipment under TSUS item 661.35.

Held: Plaintiff's challenge is dismissed because it failed to overcome the presumption of correctness attached to Custom's classification of defrost control timers as time switches within the meaning of TSUS item 715.62.

[Judgment for defendant.]

(Decided December 28, 1990)

Sonnenberg, Anderson O'Donnell & Rodriguez (*Paul S. Anderson*, *Michael A. Johnson*, and *Mary E. Gill*, of counsel), for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Kenneth N. Wolf* at trial; *James A. Curley*, on the brief), for defendant.

Opinion and Order

Carman, *Judge*: This tariff classification case is before the Court for decision following trial. Plaintiff (Admiral) contests the denial of its protest filed under section 515 of the Tariff Act of 1930, as amended. 19 U.S.C. § 1515. This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a).

For the reasons set forth herein, judgment will enter for the defendant United States dismissing this action.

Background

The imported merchandise, referred to interchangeably as defrost control timers or defrost timers, are devices used in refrigerators to regulate the cooling and defrosting cycles. The merchandise was classified by the United States Customs Service (Customs) as "time switches with watch or clock movements, or with synchronous or subsynchronous motors" under TSUS item 715.62. Alternatively, Customs

asserts that the merchandise could be classifiable as "electrical switches" under TSUS item 685.90. Plaintiff counters that the imported merchandise is properly classified as parts of "refrigerators and refrigerating equipment, whether or not electric" under TSUS item 661.35.

Below are the pertinent provisions of the tariff schedules:

Classified under:

Schedule 7, Part 2, Subpart E (1984):

Times switches with watch or clock movements, or with synchronous or subsynchronous motors:

* * * * * * *

715.62	Valued over $1.10 but not over $2.25 each	15 cents each + 10% *ad. val.* + 3.9% for each jewel, if any.

Customs alternative classification:

Schedule 6, Part 5 (1984)

685.90	Electrical switches, fuses, lightning arresters, plugs, receptacles, lamp sockets, terminals, terminal strips, function boxes and other electrical apparatus for making or breaking electrical circuits, for the protection of electrical circuits, or for making connections to or in electrical circuits; switchboards (except telephone switchboards) and control panels; all the foregoing and parts thereof	6.5% *ad. val.*

Claimed under:

Schedule 6, Part 4, Subpart A (1984):

661.35	Refrigerators and refrigerating equipment, whether or not electric, and parts thereof	3.7% *ad. val.*

FACTS

The arguments presented at trial and the parties respective post-trial briefs reveal the following undisputed facts.

The imported goods are devices that are used in refrigerators for regulating the cooling and defrost cycles. Comprised of several components, they make or break electric circuits by activating two sets of electrical contact points—one to disconnect the compressor (the cooling mechanism) and the other to connect the defrost heater. The articles are

equipped with a synchronous or subsynchronous motor. The defrost timer disconnects the compressor by opening an electrical circuit after the compressor itself has run for a length of time predetermined by the manufacturer – six or eight hours depending upon the specification of the model. Upon completion of the compressor run cycle (and simultaneously with the compressor's disconnection) the defrost heater is activated and runs for a straight twenty-one or twenty-three minutes (again depending upon the model), as predetermined by plaintiff. The actual length of the compressor cycle generally cannot be predetermined because the compressor itself does not usually run continuously, but instead is activated or deactivated in response to variables such as room temperature, frequency of door openings, etc. The aggregate length of the cycle can vary by as little as six and as many as eighteen hours.

CONTENTIONS OF THE PARTIES

Plaintiff contends that the defrost timers are not "time switches" within the meaning of TSUS item 715.62, but should be properly considered parts of "refrigerators" or "refrigerating equipment" within the meaning of TSUS item 661.35. According to plaintiff, in order to be properly classified as a time switch under TSUS item 715.62, the defrost timers *must* be capable of performing each of the following functions: (1) measuring or indicating the time of day; (2) allowing the user to set it to operate at a particular time of day; (3) run continuously; and (4) have a dial or some mechanism to permit it to be set at variant times.[1]

Plaintiff contends that the legislative history of TSUS item 715.62, as found in the explanatory notes of the *United States Tariff Commission, Tariff Classification Study*, Schedule 7, at 167 (1960) (*Study*), which indicate that time switches classified thereunder "make or break electric circuits automatically at given times," directly supports its position that time switches must measure or indicate the time of day and be let to operate at a particular time of day. According to plaintiff, the drafters of the above *Study* intended that the language "at given times" mean "specific times of the day in terms of clock time, e.g. 3:15 P.M." Plaintiff further contends that in this context "given times" means those particular times of the day which the user could set according to her needs.

Plaintiff asserts that the defrost timers do not make or break electric circuits at predetermined times, but instead at variable times that do not correspond to clock time. The circuit making and breaking occurs in discontinuous intervals because the defrost timer's operation is dependant on and subject to electric power signals received from a thermostat. These signals can occur at any and all times of the day, depending upon the cooling needs of the refrigerator in which it is housed.

Defendant does not advance arguments challenging plaintiff's position that the defrost timers are parts of refrigerators but instead, relying

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[1] Plaintiff cites several case authorities in support of this restrictive definition of time switch. *See, e.g., R. W. Cramer & Co. v. United States*, 62 Treas. Dec. 1055, T.D. 46456 (Cust. Ct. 1934), *rev'd*, 22 CCPA 45, T.D. 47049 (1934) (electric automatic time switch has calibrated dials; user can determine time of day); *Morris Friedman v. United States*, 45 CCPA 99, C.A.D. 680 (1958) (time movements for locks contains dials).

upon Headnote 1(V) of Part 4 of Schedule 6, maintains that the merchandise is more specifically provided for under TSUS item 715.62.[2] Although defendant concedes that the compressor does not usually run continuously, it asserts that the defrost timer measures real time while the compressor is actually running. Conversely, the defrost timer will not run and therefore not measure time when the compressor is not running.

Defendant challenges plaintiff's assertion that the unpredictability with respect to the length of the compressor run cycle proves that the defrost timer does not open and close electric circuits at given or predetermined times. According to defendant, the defrost timer snaps open the switch to disconnect the cooling circuit when it has measured six hours of compressor run time and then snaps on the defrost circuit. Lastly, after the defrost timer has measured off a straight twenty-one minutes, representing the length of the defrost cycle, it will snap on the cooling circuit, thus completing the overall cooling and defrosting cycles.[3]

Defendant asserts that the weight of the authorities cited by plaintiff do not hold that a time switch *must* indicate the time of day, be equipped with a dial, run continuously, and operate at times dictated by the user. The case authorities cited by plaintiff, claims defendant, do not purport to establish a list of required components for time switches. Instead, those cases address only the particular time switches before them.

In the alternative, defendant argues that the subject defrost timer could be classified as an electrical switch under TSUS item 685.90. The Court now turns to a discussion of the legal authorities governing Customs' classification of imports under the Tariff Schedules.

Discussion

A presumption of correctness exists in favor of Customs' classification of an imported product and the burden of proof rests upon the party challenging the classification. 28 U.S.C. § 2639 (a)(1); *Jarvis Clark Co. v. United States*, 2 Fed. Cir. (T) 70, 75, 733 F.2d 873, 878, *reh'g denied*, 2 Fed. Cir. (T) 97, 739 F.2d 628 (1984). This presumption pertains not only to Customs' final classification, but also to every element necessary to support that determination. *United States v. New York Merchandise Co. Inc.*, 58 CCPA 53, 58, C.A.D. 1004, 435 F.2d 1315, 1318 (1970); *Schott Optical Glass, Inc. v. United States*, 82 Cust. Ct. 11, 15, C.D. 4783, 468 F. Supp. 1318, 1320, *aff'd*, 67 CCPA 32, C.A.D. 1239, 612 F.2d 1283 (1979). In order to determine whether Customs' classification is correct, this Court must consider Customs' classification both independently and in comparison with the plaintiff's alternatives. *Jarvis Clark*, 2 Fed. Cir. (T) at 75, 733 F. 2d at 878.

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[2] Tariff Schedules of the United States Annot., Schedule 6, Part 4, Headnote 1(v) (1984). Headnote 1(v) provides that Part 4 of Schedule 6 (which encompasses Admiral's claimed classification) does not cover "articles and parts of articles specifically provided for elsewhere in the schedules." *Id.*

[3] It appears from the record that the reason why the defrost cycle lasts for a *straight* or *continuous* twenty-one or twenty-three minutes of clock time as compared to the cooling cycle, which cannot be predetermined, is that only the cooling cycle is subject to interruption by the thermostat during its operation.

It is well settled that tariff acts must be construed to carry out the intent of the legislature. *Nippon Kogaku (USA), Inc v. United States*, 69 CCPA 89, 92, 673 F.2d 380, 382 (1982); *Sandoz Chemical Works, Inc. v. United States*, 43 CCPA 152, 156, C.A.D. 623 (1956). The first place to look to establish the intent of Congress is the language of the statute itself. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.; see also Madison Galleries, Ltd. v. United States*, 870 F.2d 627, 630 (Fed. Cir. 1989). The meaning of a particular tariff term is a question of law, while the determination of whether a particular article fits within that meaning is a question of fact. *Hasbro Indus., Inc. v. United States*, 879 F.2d 838, 840 (Fed. Cir. 1989); *Stewart-Warner Corp. v. United States*, 3 Fed. Cir. (T) 20, 22, 748 F. 2d 663, 664-65 (1984); *Daw Indus., Inc. v. United States*, 1 Fed. Cir. (T) 146, 147-48, 714 F.2d 1140, 1141-42 (1983). Disputed meanings of a word in a tariff provision are resolved by ascertaining the common meaning of the word, from its commonly received and popular sense. *Schott Optical*, 82 Cust. Ct. at 16, 468 F. Supp. at 1321; *Trans-Atlantic Co. v. United States*, 60 CCPA 100, 102, C.A.D. 1088, 471 F.2d 1397, 1398 (1973); *United States v. Rembrandt Electronics, Inc.*, 64 CCPA 1, 5, C.A.D. 1175, 542 F.2d 1154, 1156 (1976). To determine the common meaning, in addition to relying upon its own understanding of the terms used, the Court may consult dictionaries, lexicons, the testimony of record, and other reliable sources of information as an aid to its knowledge. *United States v. C. J. Tower & Sons*, 44 CCPA 1, 4, C.A.D. 626 (1956); *Pistorino & Co., Inc. v. United States*, 81 Cust. Ct. 37, 41, C.D. 4763, 461 F. Supp. 331, 334 (1978), *aff'd*, 66 CCPA 95, C.A.D. 1227, 599 F.2d 444 (1979); *Schott Optical*, 82 Cust. Ct. at 16, 468 F. Supp. at 1321.

Time Switches

Time switches found under TSUS item 715.62 carry an *eo nomine* designation.[4] An *eo nomine* designation, absent contrary intent by Congress or some conflicting administrative practice or judicial authority, includes all forms of the article. *Nootka Packing Co. v. United States*, 22 CCPA 464, 469, T.D. 47464 (1935). A court may examine the use to which the imported goods are put to aid its determination as to whether they are embraced by the *eo nomine* designation. *United States v. Ouon Ouon Co.*, 46 CCPA 70, 73, C.A.D. 699 (1959).

Time switches are not defined by the Tariff Schedule of the United States (1984). *See* Tariff Schedule of the United States Schedule 7, Part 2, Subpart E, Headnotes 1-2 (1984). It is therefore necessary for this

[4] "An *eo nomine* designation is one which describes a commodity by a specific name, usually one well known to commerce." 2 R. Sturm, *Customs Law and Administration* § 53.2 (3rd ed. 1990).

Court to examine the legislative history and other extrinsic sources to determine the common meaning the subject merchandise.[5]

An examination of the *Study*[6] reveals that Congress intended that time switches under the TSUS 715.62 retain the definition accorded to those devices under paragraph 368(a) of the Tariff Act of 1930, the predecessor to TSUS 715.62. *Study, supra*, at 167; *see United States v. R.W. Cramer & Co.*, 22 CCPA 45, 48-49, T.D. 47049 (1934). The *Study* provides as follows:

> *Time switches* — Items 715.60 through 715.68 would continue without change the tariff treatment now accorded under paragraph 368(a) to time switches. These articles are designed primarily to make or break electric circuits automatically at given times, and are used to control lighting and heating circuits, pumps, etc.

See Study, supra, at 167.

Another relevant source of legislative history cited by the parties is the explanatory notes to the Brussels Nomenclature.[7] *Customs Cooperation Council, Explanatory Notes to the Brussels Nomenclature 1955* 1111-12 (1964) (*Brussels Nomenclature*). It provides in relevant part as follows:

> 91.06 — TIMES SWITCHES WITH CLOCK OR WATCH MOVEMENT (INCLUDING SECONDARY MOVEMENT) OR WITH SYNCHRONOUS MOTOR
>
> This heading covers devices which do not have the character of clocks of heading 91.04, but are mainly designed to make or break electric circuits automatically at given times, usually at times determined according to a previously established daily or weekly programme. To be included in this heading these devices must have a movement of the watch or clock type (including secondary or synchronous motor clock movements) or a synchronous motor with or without reduction gear.
>
> Time switches are used for the control of lighting circuits (for public places, shop-windows, staircases, illuminated signs, etc.), heating circuits (water heaters, etc.), cooling installations, pumps, two-rate electricity supply meters, etc. They consist essentially of a mechanical or electric movement of the watch or clock type or a synchronous motor, usually a dial with or without hands, a time-regulating device (levers and pins), together with systems of driving relays, switches and commutators. The whole is enclosed in a case with terminals. The dial is usually marked in hours and sometimes also in the days and months; levers or pins around its periphery actuate the contact devices at the desired times.

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[5] The common meaning of an *eo nomine* designation is determined by the meaning it had at the time of enactment of the tariff act. *United States v. Brager-Larsen*, 36 CCPA 1, 3-4, C.A.D. 388 (1948); *Davies Turner & Co. v. United States*, 45 CCPA 39, 41, C.A.D. 669 (1957).

[6] The *Tariff Classification Study* has been recognized as part of the legislative history of the Tariff Act. *Rifkin Textiles Corp. v. United States*, 54 CCPA 138, 141, C.A.D. 925, *cert. denied*, 389 U.S. 931 (1967).

[7] "The Brussels Nomenclature has been considered a proper source of legislative history where the statute is ambiguous and the *language of the two are similar.*" 2 R. Sturm, *Customs Law & Administration* § 52.2, at 18 (3rd ed. 1990).

> Time switches may be set in action by thermostats, pressure regulators, water level regulators, etc.

Id. (emphasis in original).

At trial, plaintiff introduced various technical lexicons in support of its narrow definition of time switches. For instance, the *McGraw-Hill Encyclopedia of Science and Technology* 40 (6th ed. 1987) defines a time switch as a device that "runs continuously and opens and closes electrical contacts at preset instants of time." Another technical manual defines a time switch as "a 24-hr. timing device of the type generally used to open and close electric circuits according to the time of day, on a continually repeating schedule." *Process Instruments and Controls Handbook* 17-126 (D.M. Considine ed. 1974).

Despite plaintiff's assertions that time switches must run continuously, have a dial, indicate the time of day, and be capable being set by the user, this Court finds no definitive evidence in the record or in the sources cited that Congress intended those characteristics to be present in a device in order for it to qualify as a time switch within the meaning of TSUS 715.62.[8] The technical, scientific definitions of time switches introduced by plaintiff are not controlling. Tariff terms generally "are not drafted in terms of science, but in the language of commerce, which is presumptively that in common use." *Hummel Chemical Co. v. United States*, 29 CCPA 178, 183, C.A.D. 189 (1941). The Court finds that the common, ordinary meaning of a time switch somewhat broader, as reflected by the following definition found in *Webster's Third New International Dictionary* 2395 (1986): "an electric switch that automatically operates at a set time."

The pivotal legal question before the Court, therefore, is the meaning of predetermined, given, or set times in the context of *when* time switches are deemed to make or break electric circuits within the meaning of item 715.62, TSUS. As discussed, such an inquiry first requires an analysis of the treatment accorded paragraph 368(a) of the Tariff Act of 1930, the predecessor of item 715.62, TSUS.

Paragraph 368(a), which provided for "any mechanism, device, or instrument intended or suitable for * * * performing any operation or function at a predetermined time or times[,]" has been found to cover an electric automatic time switch. *R. W. Cramer & Co.*, 22 CCPA at 48-49. In *Morris Friedman v. United States*, 45 CCPA 99, C.A.D. 680 (1958) the court attempted to decipher the meaning of predetermined or given times under paragraph 368(a) in the context of a timing device generally used in connection with a bank vault lock. The court first drew a distinction between paragraph 367, which provided for time keeping or time measuring devices, and paragraph 368(a), which provided for devices that recorded, indicated, or performed some function at a predeter-

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[8] It is furthermore interesting to note that the *Brussels Nomenclature* does not *require* that time switches indicate the time of day, be capable of adjustment by the consumer, run continuously or be equipped with dials. *Brussels Nomenclature, supra*, at 111212. Instead, that document states that time switches are "usually" equipped with dials that are "usually marked in hours". Moreover, the *Tariff Classification Study* is silent with respect to these characteristics.

mined time. It then concluded that paragraph 368(a) was intended by the legislature to cover devices other than those solely considered "time keeping" or "time measuring":

> It seems clear, therefore, that Congress must have intended the 'predetermined time (etc)' provision of paragraph 368 to embrace something *different* from that included in the provision for 'time-keeping, time-measuring, or time-indicating' devices, while recognizing that the two provisions could, in certain cases, equally cover a given device (as evidenced by the exception to paragraph 368). The involved provisions must be interpreted with this in mind.
>
> [T]he minimum requirement for a time-keeping, measuring or indicating device is that it shall be capable, in normal use, of showing how much time has passed since or remains before some particular time or event.

Id. at 103 (emphasis added). Further, the *Morris* court recognized that paragraph 368(a) did not require devices classified thereunder to have dials or measure the time of day:

> There are various ways in which a single device may serve to keep, measure or indicate time and to perform some function at a predetermined time. Time-keening, measuring or indicating may be the primary function or such a device, as in alarm clocks, or it may have varying lesser degrees of importance, as in clock-thermostats and devices such as electric oven timers which serve primarily to do something after a predetermined time, but which also include a dial and a pointer to show how much of that time has passed or remains. It would seem that all the instruments above referred to could properly be considered to be time-keeping, measuring or indicating devices, since they are definitely designed to mark the passage of time and have at least one part which performs no other function.
>
> * * * * * * *
>
> Finally, there are devices which perform a function at a predetermined time, but in which *the operating parts are concealed so that the device would not normally convey any information as to the passage of time*. The instant devices are of that character since, as testified by one of appellant's witnesses, 'you would have to be locked in the vault once it was closed to see if it [the device] was wound up.' While the record does not show how such a device would be placed when used in a burglar alarm system, it seems evident that it would operate principally, if not solely, at times when the building to be protected was unoccupied, and could thus serve no time-keeping, measuring or indicating function in the sense in which we believe those words were used by Congress.

Id. at 103-04 (emphasis added).

In sum, it appears that the *Morris* court contemplated devices under paragraph 368(a) for which a dial or some other time-measuring or indicating part would not be practical or necessary to carry out its primary function—to make or break circuits after a predetermined amount of

time has elapsed.[9] Although most of the devices found to be time switches in the above cited cases had dials and were generally calibrated to perform some function at the time of day that the user desired, the rulings in those cases were not intended to limit paragraph 368(a) solely to devices that possessed those characteristics.

This Court finds that TSUS item 715.62 covers a range of time switches that at a minimum must make or break an electric circuit automatically upon the completion of some preset time interval. The Court must next determine whether the provision for time switches under TSUS item 715.62 is broad enough to bring the subject imports fairly within its scope.

Defrost Control Timers

At trial, five different models of the subject defrost timers were received in evidence as plaintiff's exhibits 1 through 5. Plaintiff's exhibit 6 was received in evidence to represent a defrost timer which had been unassembled to reveal its internal mechanism. A witness for plaintiff, Mr. Thomas C. Anell, a manager of electrical design for Admiral, described the components and operation of the subject defrost timer as follows:

> it consists of a [plastic] switch case * * * the housing, and a cam * * * which is circular * * * and the switch blades and contacts. * * * [W]hen the cam is turned by the gear train, which is attached to the subsynchronous motor, * * * it forms the driving motor that operates the cam. And as the cam turns, these electrical contacts on the blades will * * * [make] a circuit[ ]. * * * In this case the upper two blades are in contact. And, as it proceeds through the cycle and drops off of the cam, the lower set of contacts are now made and the upper circuit is broken. So, over a period of time, the cam will advance based upon accumulated compressor run time. And in this mode right now, the upper set of contacts would provide energy to the compressor circuits. And as we—approach the time when we have accumulated the full amount of compressor run time the cam will allow, * * * the blades drop off the lobe of the cam and will now switch to the heater circuit being made and [the] compressor circuit being open.

Trial Transcript (Tr.) at 37-38.

Another witness for the plaintiff, John Cable, testified that the electric circuit making or breaking function of the defrost timer occurs not at predetermined or preset times of the day, but rather at "variable times, depending upon such factors external to the defrost timers as room ambient, humidity, desired temperature within the refrigerator

[9] To be sure, had the drafters of paragraph 368(a) used the preposition "after" instead of "at" in the phrase "at a predetermined time," this would be an easier case; a provision requiring circuit making or breaking "after" a predetermined time would seem to more clearly describe the nature of the switching function in the subject merchandise, which occurs *following* a predetermined time *interval* of six or eight hours. The meaning of "time" or "times" in the language "predetermined time or times" is less troublesome for the Court. Time is "[t]he measure of duration. The word is expressive of both a precise *point* or *terminus* and of an interval between two points." *Black's Law Dictionary* 1329 (5th ed. 1979). In any event, this Court holds elsewhere in this opinion that Congress's choice of the language "at a predetermined time or times" or "at given times" is sufficiently broad to encompass the primary function of the subject merchandise.

and usage of the refrigerator in terms of number of door openings." Tr. at 102. Plaintiff's witness further testified that "[a]lthough the accumulated compressor run time will always be a set six or eight hour period, the circuits made or broken enabling the compressor to cycle will be variable, resulting in widely variable intervals depending upon the factors mentioned before." *Id.* at 103.

The only defense witness called to testify at trial was Robert A. Heinzen, an expert in areas of defrost systems, synchronous motors, and components of electrical motors. He described the merchandise as follows:

> The defrost timer is an electrical switch that is controlled by a synchronous motor. A rotating shaft attached to the rotor in the motor drives a series of gears that connect to a cam. After a predetermined interval, as measured by the rotation of the rotor, the cam causes the switch, which is equipped with electrical contact points, to open and close electric circuits that connect a compressor and a radiant heater.

Id. at 125. The concurrent switching function just described occurs after the motorized gear-to-cam mechanism within the defrost timer has measured or "accumulated" six or eight hours of actual compressor run time, depending upon the particular model. *Id.* at 126. Upon completion of the compressor run cycle, a defrost heater will be activated and run for twenty-one or twenty-three minutes of straight time, again depending upon the model.[10]

The defrost timer measures real time while the compressor is actually running. Tr. at 130. This is illustrated by the interaction between the major components of the cooling and defrosting system of a refrigerator. Between the compressor and the refrigerator's power source is a thermostat, also referred to by plaintiff as the temperature control, which is separate from the defrost timer and is used to maintain refrigerator temperature. Tr. at 43-44.[11] This thermostat contains an electric switch that closes a circuit providing electric current through that closed switch to the defrost timer when the thermostat calls for cooling. At this point, the motor of the defrost timer is energized, operating a gear train which turns the cam; simultaneously, the compressor is running. Tr. at 46. The cam, which operates in conjunction with the running of the compressor, measures real time so that if one could observe the cam's position at a particular point in the cycle, one presumably could see how much longer the compressor would run before six or eight hours have

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[10] Admiral identifies each defrost timer by a model number which indicates the *aggregate* amount (in hours) of compressor run time, followed by the length (in minutes) of straight time that the defrost heater will operate as measured by the defrost timer. For example, plaintiff's exhibit 2 is designated TMDE 621ZA9. The "621" means six hours of compressor run time and twenty-one minutes of defrost time. Similarly, plaintiff's exhibit 3 is designated TMDE 823 VB9, indicating eight hours of compressor run time and twenty-three minutes of defrost time. *See* Tr. at 85-86.

[11] Plaintiff appears to argue that the presence of a thermostat makes the subject defrost timer more temperature-controlled than time-controlled. The Court need not reach that question, particularly since the Brussels Nomenclature recognized that time switches can be activated by thermostats. *Brussels Nomenclature, supra*, at 1111-12.

elapsed. The result would be a switching function by the defrost timer.[12] Since the cam's rotation is interrupted whenever the thermostat signals the compressor (via the defrost timer) to stop, the observer in the above hypothetical would not be able to determine how much time remained in the cooling *cycle*. In essence, the thermostat determines *when* and *how often* the compressor runs, but the defrost timer measures *how long* the compressor has actually run and performs a switching function at the end of the aggregate six or eight hour interval.

The subject defrost timers measure time both indirectly and directly. They determine time indirectly by measuring how long the compressor itself has actually run. The timers perform a switching function after a component other than itself, the compressor, has run for a length of time preset by the manufacturer – six or eight hours varying by model. From this perspective, the defrost timer is not directly measuring time, but instead is "timing" how long something else is actually operating and performs the requisite switching function when that timing function is complete. When the refrigerator is in the defrost cycle, the defrost timers measure time directly. At the end of the cooling cycle, the defrost timer automatically activates (switches on) a defrost heater, then measures off a continuous twenty-one or twenty-three minutes of straight clock time, after which the defrost timer automatically deactivates (switches off) the heater.

Defendant's example of a basketball clock is analogous of what the defrost timer is designed to accomplish.[13] Mr. Heinzen testified on this point as follows:

> While the defrost timer will measure the amount of time the compressor is running, the clock will measure the amount of time the ball is in play. When the ball is not in play, the clock will not run. The clock thus measures a predetermined or given amount of time the ball is in play, as for example, 60 minutes, and then signals the end of the game. Although the game from beginning to end might take two or three hours to complete, the clock will measure predetermined or given amount of playing time. Similarly, the defrost timer will measure a predetermined or given amount of time that the compressor is in operation.

Tr. at 131.

Nothing in the record or authorities cited leads this Court to conclude that Congress intended time switches to carry the restrictive and technical definition which plaintiff attaches. If the Court were to adopt plaintiff's definition of a time switch under TSUS item 715.62, then any device that makes or breaks an electric circuit after it measures an *inter-*

[12] Defendant's witness Heinzen on cross-examination testified that the defrost timer could, with other information, operate as a "crude clock," allowing one to determine the time of day by observing the relative position of the cam to the mark on the case. Tr. at 149.

[13] Although such a device is not before this Court, a basketball clock does not seem to fit within the TSUS provision for time switches. As set forth in the testimony of Mr. Heinzen, the only witness for the defendant, a basketball clock does not make or break electric circuits "automatically." It does so only through human intervention, *i.e.*, a timekeeper. The defrost timers before the Court make or break electric circuits automatically.

val of time predetermined by the manufacturer, standing alone, could not be a time switch. As discussed herein, the Court finds that Congress did not contemplate that time switches tell the time of day, have dials, operate continuously without interruptions, and be set by the consumer to operate at clock times. Presumably, some time switches require those characteristics to carry out their intended functions. Nevertheless, the defrost control timers in their present condition satisfy the principal requirements for time switches found in the *Tariff Classification Study*, the *Brussels Nomenclature*, and in paragraph 368(a) of the Tariff Act of 1930. They make or break electric circuits after they have measured a specific time interval as predetermined by the manufacturer.

The fact that the switching function of the defrost timer may occur at various times of the day does not mean they are not time switches. Given the purpose for which the defrost timers are designed and used, the time of day that the switching function occurs is apparently irrelevant. The respective lengths of time that the compressor and the defrost heater operate are, conversely, quite relevant and accordingly predetermined by the manufacturer. It is the function of these defrost timers to measure these time intervals and perform some function afterwards. Simply because the consumer cannot alter these time intervals does not make the defrost timer something other than a time switch.

Nor does the discontinuous nature of the cooling cycle remove the defrost timers from inclusion as time switches under TSUS item 715.62. The Court finds it difficult to imagine that Congress intended to exclude devices from the meaning of time switches which are designed to allow for variables during the course of their timing cycles. In the instant case, as discussed, a thermostat is responsible for breaking the continuity of the cooling cycle. As noted, the Brussels Nomenclature recognizes that time switches may be activated by thermostats.

The Court holds plaintiff has failed to overcome the presumption of correctness which attaches to Customs' classification. Accordingly, the Court finds the subject imports were properly classified by the defendant as time switches under item 715.62, TSUS. Therefore, it is unnecessary to decide whether the imports are electrical switches under defendant's alternative classification, TSUS item 685.90. Further, Headnote 1(v) of Part 4 of Schedule 6 of the Tariff Schedules of the United States (1984) requires that this Court reject plaintiff's claimed classification of defrost timers as parts of refrigerators or refrigerating equipment under TSUS item 661.35, because these devices are more specifically provided for under the *eo nomine* provision for time switches.

Conclusion

On the basis of the foregoing, this Court holds plaintiff has failed to overcome the presumption of correctness attached to Customs' classification. The imports were properly classified under TSUS item 715.62 as time switches. This action is dismissed.

ABSTRACTED CLAS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASS
C90/545 12/5/90 Aquilino, J.	Accutime Watch Corp.	87-1-00078	716.09– 715.0 Vario
C90/546 12/5/90 Aquilino, J.	Branded Time Corp.	86-9-01176	716.09– 715.0 Vario
C90/547 12/5/90 Aquilino, J.	Branded Time Corp.	87-1-01179	716.09– 715.0 Vario
C90/548 12/5/90 Aquilino, J.	Dynamic Supply, Inc.	87-2-00221	716.09– 715.0 Vario
C90/549 12/5/90 Aquilino, J.	Eastman Watch Co.	87-1-00082	716.09– 715.0 Vario

SSIFICATION DECISIONS

SESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
-716.45, 05 ous rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
-716.45, 05 ous rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
-716.45, 05 ous rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
-716.45, 05 ous rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
-716.45, 05 ous rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.

C90/550 12/5/90 Aquilino, J.	F&K Watch Co.	87-1-00090
C90/551 12/5/90 Aquilino, J.	Jawhar Trading Corp.	87-2-00222
C90/552 12/5/90 Aquilino, J.	Liberty Int'l Trading Inc.	86-9-01125
C90/553 12/5/90 Aquilino, J.	Liberty Int'l Trading Inc.	87-1-00080
C90/554 12/5/90 Aquilino, J.	Liberty Int'l Trading Inc.	87-2-00226
C90/555 12/5/90 Aquilino, J.	Miracle Watch Co.	86-9-01177

716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
716.09–716.45, 715.05 Various rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.

ABSTRACTED CLASSIFICATION I

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C90/556 12/5/90 Aquilino, J.	Miracle Watch Co.	87-1-00081	716.09–716.45, 715.05 Various rates
C90/557 12/5/90 Aquilino, J.	Nissho Iwai American Corp.	88-5-00340	700.95 12.5%
C90/558 12/5/90 Watson, J.	Olympus Corp.	88-11-00883	708.93 9%
C90/559 12/5/90 Aquilino, J.	Proline Products, Inc.	86-9-01127	716.09–716.45, 715.05 Various rates
C90/560 12/5/90 Aquilino, J.	S.K. Suppliers	86-8-01066	716.09–716.45, 715.05 Various rates

DECISIONS – Continued

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
700.45 10% 700.35 8.5%	Mitsubishi Int'l Corp. *v.* U.S., S.O. 87-136 (1987)	Portland Footwear
676.54 Free of duty	EAC Engineering *v.* U.S., 9 CIT 534 (1985)	New York "Olympus Optical Pickup Model TAOHS – PC-5," etc.
688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.

C90/561 12/5/90 Aquilino, J.	Wallem Int'l Corp.	86-9-01128	716.09–716.45 715.05 Various rat
C90/562 12/5/90 Aquilino, J.	Western Sales	83-1-00104	716.09–716.45 715.05 Various rat
C90/563 12/5/90 Aquilino, J.	F&K Watch	88-4-00313	716.09–716.45 715.05 Various rat
C90/564 12/11/90 Aquilino, J.	Liberty Int'l Trading inc.	87-2-00182	716.09–716.45 715.05 Various rat
C90/565 12/11/90 Aquilino, J.	Nastrix Corp.	87-2-00184	716.09–716.45 715.05 Various rat
C90/566 12/11/90 Aquilino, J.	Omni Quartz Ltd.	87-2-00186	716.09–716.45 715.05 Various rat

5, tes	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
5, tes	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	Los Angeles Quartz analog watches etc.
5, tes	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
5, tes	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
5, tes	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
5, tes	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.

ABSTRACTED CLASSIFICA

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSI
C90/567 12/11/90 Aquilino, J.	Tail, Inc.	90-2-00085	6202.13. 29.5% 6204.63. 30.4% (trous
C90/568 12/11/90 Aquilino, J.	Wallem Int'l Corp.	87-2-00183	716.09–7 715.05 Variou
C90/569 12/11/90 Aquilino, J.	Woolrich, Inc.	88-10-00798	379.06 o 28%
C90/570 12/13/90 Aquilino, J.	A Classic Time	86-7-00851	716.09–7 715.05 Variou
C90/571 12/13/90 Aquilino, J.	A Classic Time	87-2-00180	716.09–7 715.05 Variou

ATION DECISIONS – Continued

ESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
3.4020 % (jackets) 3.3510 % sers)	6211.43.0040 (trousers) or 6211.43.0050 (jackets) 17%	Agreed statement of facts	Miami Jackets and trousers
-716.45, 95 ous rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
or 383.06	379.62 or 383.47 16.5%	Agreed statement of facts	Philadelphia Cotton woven pants
-716.45, 95 ous rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
-716.45, 95 ous rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.

C90/572 12/13/90 Aquilino, J.	Belfont Sales Corp.	87-2-00146	716.09–71 715.05 Various
C90/573 12/13/90 Aquilino, J.	Branded Time Corp.	87-2-00181	716.09–71 715.05 Various
C90/574 12/13/90 Aquilino, J.	Branded Time Corp.	86-6-00734	716.09–71 715.05 Various
C90/575 12/13/90 Aquilino, J.	Eko Corp.	85-4-00531	716.09–71 715.05 Various
C90/576 12/13/90 Watson, J.	Famous Raincoat Co.	90-8-00424	384.91 25.5%
C90/577 12/13/90 Aquilino, J.	F&K Watch Co.	86-8-01043	716.09–71 715.05 Various
C90/578 12/13/90 Aquilino, J.	I.D. Enterprises, Inc.	86-9-01106	716.09–71 715.05 Various

16.45, s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
16.45, s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
16.45, s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
16.45, s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	Los Angeles Quartz analog watches etc.
	376.56 9.1%	Famous Raincoat Co. *v.* U.S., S.O. 90.78 (1990)	New York Wearing apparel
16.45, s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
16.45, s rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	Los Angeles Quartz analog watches etc.

ABSTRACTED CLASSIFICATION

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C90/579 12/13/90 Aquilino, J.	I.D. Enterprises, Inc.	87-6-00748	716.09–716.45, 715.05 Various rates
C90/580 12/13/90 Aquilino, J.	Jawhar Trading Corp.	86-7-00945	716.09–716.45, 715.05 Various rates
C90/581 12/13/90 Re, C.J.	Nissho Iwai American Corp.	87-11-01129	700.95 12.5%
C90/582 12/13/90 Aquilino, J.	Proline Products, Inc.	86-6-00735	716.09–716.45, 715.05 Various rates
C90/583 12/17/90 Aquilino, J.	Accutime Watch Corp.	86-7-00846	716.09–716.45, 715.05 Various rates

N DECISIONS–Continued

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	Los Angeles Quartz analog watches etc.
688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
700.35 8.5%	Mitsubishi Int'l Corp. *v.* U.S., S.O. 87-136 (1987)	Los Angeles Footwear
688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.

C90/584 12/17/90 Aquilino, J.	Anchor Time	86-6-00763	716.09–716.4 715.05 Various ra
C90/585 12/17/90 Aquilino, J.	Anchor Time	86-7-00849	716.09–716.4 715.05 Various ra
C90/586 12/17/90 Aquilino, J.	Casio, Inc.	85-12-01710	716.09–716.4 715.05, etc Various ra
C90/587 12/17/90 Aquilino, J.	Eastman Watch Co.	86-7-00847	716.09–716.4 715.05 Various ra
C90/588 12/17/90 Aquilino, J.	I.D. Enterprises Inc.	85-4-00532	716.09–716.4 715.05, etc Various ra
C90/589 12/17/90 Aquilino, J.	Juno Export	86-6-00771	716.09–716.4 715.05 Various ra

.45, ates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
.45, ates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
.45, tc. ates	688.45, 688.42, 688.43, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	Los Angeles Quartz analog watches etc.
.45, ates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
.45, tc. ates	688.45, 688.42, 688.43, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	Los Angeles Quartz analog watches etc.
.45, ates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.

ABSTRACTED CLASSIFICATI

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESS
C90/590 12/17/90 Aquilino, J.	Liberty Int'l Trading Inc.	86-7-00845	716.09–716. 715.05 Various r
C90/591 12/17/90 Aquilino, J.	Miracle Watch Co.	86-7-00848	716.09–716 715.05 Various r
C90/592 12/17/90 Aquilino, J.	Omni Quartz Ltd.	86-6-00741	716.09–716 715.05 Various r
C90/593 12/17/90 Aquilino, J.	Omni Quartz Ltd.	86-7-00850	716.09–716 715.05 Various r
C90/594 12/17/90 Tsoucalas, J.	Sarne Handbag Co.	87-7-00756	706.41 20%
C90/595 12/17/90 Tsoucalas, J.	Sarne Handbag Co.	88-4-00261	706.41 20%

...ION DECISIONS—Continued

...SED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
...6.45, ... rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
...6.45, ... rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
...6.45, ... rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
...6.45, ... rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
	706.34 11.6%	Agreed statement of facts	New York Handbags
	706.34 11.6%	Agreed statement of facts	New York Handbags

C90/596 12/17/90 Aquilino, J.	Wallen Int'l Corp.	86-6-00766	716.09 715. Vari
C90/597 12/17/90 Aquilino, J.	Western Sales	84-12-01737	716.09 715. Vari
C90/598 12/17/90 Aquilino, J.	World Forum Watch	86-6-00768	716.09 715. Vari
C90/599 12/18/90 Watson, J.	Data Products Corp.	89-4-00184	410.22 15%
C90/600 12/18/90 Watson, J.	Old Republic Insurance Co.	88-6-00453	A407. Free c
C90/601 12/18/90 Watson, J.	Unisa America, Inc.	90-4-00220	700.56 37.5
C90/602 12/18/90 Re, C.J.	Huffy Corp.	82-7-00968	772.48 5% 772.57 15%

09–716.45, 5.05 rious rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
09–716.45, 5.05, etc. rious rates	688.45, 688.42, 688.43, 688.36, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	Los Angeles Quartz analog watches etc.
09–716.45, 5.05 rious rates	688.45, 688.42, 688.43, or 688.36 Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
22 %	408.41 8.5% 676.54 Free of duty	Tomoegawa U.S.A., Inc. *v.* U.S., (1988)	Los Angeles Toner & developer
.16 of duty	A407.16 Free of duty	Agreed statement of facts	Houston Benzeniod compound
56 .5%	700.56 6%	Agreed statement of facts	Miami Footwear
48 % 57 %	772.48 5% (entirety) or 772.57, 732.39, 732.42 Various rates for unequal numbers of casings and inner tubes	Huffy Corp. *v.* U.S., 730 F. 432 (1990)	Seattle, Bicycle outer casings and inner tubes

ABSTRACTED CLASSIFICATIO

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSE
C90/603 12/20/90 Watson, J.	Spradling Int'l, Inc.	90-6-00264	355.85 5.3%
C90/604 12/26/90 Watson, J.	Societe Financiere	87-11-01089	427.88 with a tional dutie assessed un 901.50
C90/605 12/26/90 Watson, J.	Societe Financiere	88-3-00228	427.88 with a tional dutie assessed un 901.50
C90/606 12/13/90 Watson, J.	Stride Rite Corp.	89-11-0635	700.95 12.5%
C90/607 12/27/90 Aquilino, J.	E. Gluck Corp.	87-3-00536	716.09-716.45 715.05, etc. Various rat
C90/608 12/27/90 Watson, J.	Hyde Athletics Indus., Inc.	89-3-00160	700.95 12.5%
C90/609 12/27/90 Watson, J.	Hyde Athletic Indus., Inc.	90-3-00103	700.95 12.5%

ON DECISIONS – Continued

ED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
	355.81 Free of ducty	Agreed statement of facts	Miami Not stated
addi- ies nder	Refund of one-third of additional duties	Agreed statement of facts	New York Ethyl alcohol
addi- ies nder	Refund of one-third of additional duties	Agreed statement of facts	New York Ethyl alcohol
	700.56 6%	Agreed statement of facts	Long Beach Footwear
5, c. tes	688.45, 688.42, 688.43, 688.36, etc. Various rates	Belfont Sales Corp. *v.* U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches etc.
	A791.90 Free of duty	Agreed statement of facts	Boston Footwear
	A791.90 Free of duty	Agreed statement of facts	Portland Footwear

Appeals to the U.S. Court of Appeals for the Federal Circuit

Bakelite Thermosets, Ltd. *v.* United States, 14 CIT___, Slip Op. 90-62 (June 28, 1990), *appeal docketed*, No. 90-1499 (Fed. Cir. Sept. 6, 1990).

Kalan, Inc. *v.* United States, 14 CIT___, Slip Op. 90-119 (Nov. 21, 1990), *appeal docketed*, No. 91-1117 (Fed. Cir. Dec. 14, 1990).

Suramerica de Aleaciones Laminadas, C.A. *v.* Unted States, 14 CIT___, Slip Op. 90-79 (August 22, 1990), *appeal docketed*, No. 91-1050 (Fed. Cir. Nov. 1, 1990).

Torrington Co. *v.* United States, 14 CIT___, Slip Op. 90-90 (Sept. 11, 1990), *appeal docketed*, No. 91-1084 (Fed. Cir. Nov. 21, 1990).

W.R. Filbin & Co. *v.* United States, 14 CIT___, Slip Op. 90-84 (August 31, 1990), *appeal docketed*, No. 91-1049 (Fed. Cir. Oct. 29, 1990).

Decisions of the U.S. Court of Appeals for the Federal Circuit

Avesta AB *v.* United States, 13 CIT___, Slip Op. 89-152 (Oct. 27, 1989), *aff'd*, No. 90-1120 (Fed. Cir. Sept. 14, 1990).

Borlem S.A. *v.* United States, 13 CIT___, Slip Op. 89-93 (June 29, 1989), *aff'd & remanded*, No. 90-1085, -1086 & -1087 (Fed. Cir. Sept. 6, 1990).

Eastalco Aluminum Co. *v.* United States, Slip Op. 89-148 (Oct. 19, 1989), *aff'd*, No. 90-1130 (Fed. Cir. Oct. 18, 1990).

E. M. Chemicals *v.* United States, 13 CIT___, Slip Op. 89-146, as amended (Octboer 30, 1989), *aff'd*, No. 90-1141 (Fed. Cir. Nov. 28, 1990).

Huffy Corp. *v.* United States, 14 CIT___, Slip Op. 90-2 (Jan. 9, 1990), *dismissed*, No. 90-1271 (Fed. Cir. May 4, 1990).

Libbey Glass *v.* United States, 14 CIT___, Slip Op. 90-15 (Feb. 13, 1990), *aff'd*, No. 90-1295 (Fed. Cir. Dec. 18, 1990).

Marsuda-Rodgers Int'l *v.* United States, 14 CIT___, Slip Op. 90-35 (April 3, 1990), *rev'd*, Nos. 90-1298, -1316 (Fed. Cir. Nov. 29, 1990)

Metallverken Nederlands, B.V. *v.* United States, 14 CIT___, Slip Op. 90-68 (July 20, 1990), *dismissed*, No. 90-1526 (Fed. Cir. Nov. 29, 1990).

Sea-Land Service, Inc. *v.* United States, 14 CIT___, Slip Op. 90-28 (March 23, 1990), *aff'd*, No. 90-1311 (Fed. Cir. Nov. 30, 1990).

Smith Corona Corp. *v.* United States, 13 CIT___, Slip Op. 89-14 (Feb. 3, 1989), *aff'd in part, rev'd in part*, Nos. 89-1387, -1388, -1389, -1398, -1399, -1400 (Fed. Cir. Sept. 26, 1990.)

U.H.F.C. Co. *v.* United States, 13 CIT___, Slip Ops. 89-19 & 89-60 (Feb. 14 & May 4, 1989), *aff'd in part, rev'd in part & remanded*, No. 89-1502 (Fed. Cir. Oct. 11, 1990.)

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